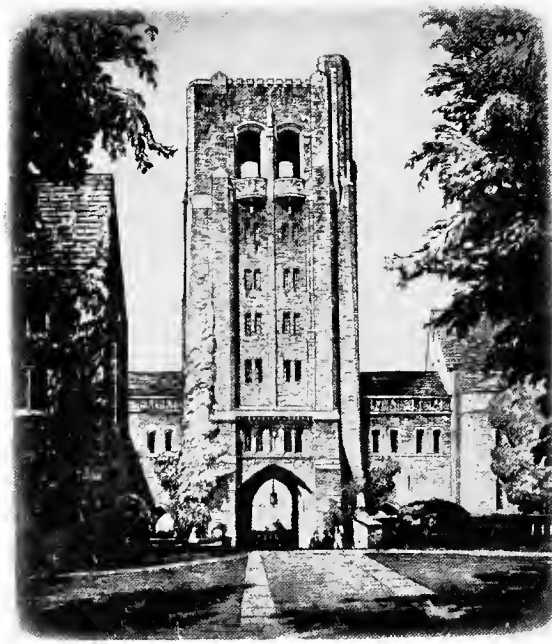

A DIGEST

OF THE

Law of Evidence

AS ESTABLISHED IN THE UNITED STATES.

ADAPTED FROM THE ENGLISH WORK OF

SIR JAMES FITZJAMES STEPHEN, K. C. S. I.,

JUDGE OF HER MAJESTY'S HIGH COURT OF JUSTICE.

With References to Decisions of the Federal and State Courts.

BY WILLIAM REYNOLDS,

OF THE BALTIMORE BAR.

THIRD EDITION.

REVISED FROM THE SIXTH EDITION OF STEPHEN.

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American Editor's Preface.

Sir James Fitzjames Stephen, in his *Digest of the Law of Evidence*, has attempted to express, in the form of a statute, the existing English law of evidence. The value of such a work is obvious, for evidence is pre-eminently the one branch of jurisprudence which every lawyer who aspires to any success at *nisi prius* practice must always have ready, so to speak, at his fingers' ends. Scarcely a case is tried but during its progress some question of evidence is suddenly raised which counsel, on one side at least, could not possibly have anticipated, and must therefore be ready to discuss at the moment and without preparation, for courts cannot afford to wait for them to look up the point in Greenleaf, Taylor or Wharton. To be able at once to state with clearness and precision the rule of evidence applicable to any point that may be made in the course of a trial, would be a matter of no small difficulty to one whose sole acquaintance with the law of evidence had been derived from the voluminous treatises upon that subject now generally recognized as the standard authorities, but it might be done much more easily by a person who had spent, in the careful study of a small book like that of Sir James Stephen, the same

time he would have been occupied in even once reading through any of the larger works.

The advantages to be expected from such a work as Sir James Stephen has prepared may be briefly stated as follows: 1. It furnishes the student with a manual from which he can get in a short time an accurate knowledge of the *general results* of the various decisions and statutes, and a thorough acquaintance with the rules of evidence by which the courts he is about to practice in now govern their mode of procedure. 2. It gives the practicing lawyer a much needed *vade mecum* for the trial table, so small that he can soon become sufficiently familiar with it to be able at a moment's notice to find a clear and authoritative statement of the premises upon which to base his argument on any of the various points that unexpectedly arise at *nisi prius*. 3. It serves as a basis and a valuable preparation for that most difficult and much needed work, a complete codification of the law of evidence.

But does Sir James Stephen's digest fulfill these expectations? It appears to do so in England, but certainly cannot in this country, for the very sufficient reason that the English law of evidence differs materially in many respects from that prevailing in the United States, and Sir James only undertakes to state the existing English law. A little more than a century ago, the law of evidence in the two countries was identical, but since then many changes have been produced by different forms of government, and the different social relations under which the two peoples

have lived, to say nothing of the conflicting decisions of many courts, and the diverse legislation of more than a century. In England alone some thirty-nine statutes bearing upon the law of evidence have been enacted, most of them within the last forty or fifty years, and parts, at least, of about twenty-four of them have been incorporated by Sir James Stephen in his digest. Under these circumstances the latter work cannot, as it stands, be safely relied on as an authority upon the existing law of evidence in this country, and it can hardly, therefore, be of much practical value on this side of the Atlantic, excepting to those who have learned from other sources the particulars wherein the English law differs from their own.

The object of the present publication is to provide the bar of the United States with a work bearing precisely the same relation to the law of evidence under which we practice, that Sir James Stephen's digest does to the English law of evidence, and the plan adopted has been to carefully compare each article of that work with the law as laid down by the American authorities, and wherever they are in harmony to leave the text unchanged, citing a few American cases to support it; but where the rule established by the American differs from that given in the text, to alter the text so as to make it express the American rule. There could be no better illustration of the extent of the difference between the American and the English law, as now established, than the fact that although I have always endeavored to preserve, as far as possible, the English text

unaltered, I have been obliged to entirely re-write TWENTY-THREE of the one hundred and forty-three articles into which the work is divided, and to make alterations in FORTY-SEVEN more.

I have not attempted to cite all the adjudged cases on any point, but have adhered to the author's original plan of merely stating the rules that have the weight of the best authorities in their favor, and where there are many conflicting decisions of any considerable weight, I have generally called attention to the fact in the foot notes, and referred to some standard authority in which the cases are all collected. In selecting cases for citation, I have sought to give preference to those in which the judges have most fully discussed the question under consideration, and which have been decided either by the Supreme Court of the United States or such other tribunals as are most generally esteemed high authorities beyond the limits of their own jurisdiction. The English cases in support of the text of the original work I have retained, except in a few cases where alterations in the text rendered them inapplicable. I have also retained the *Illustrations*, but have been obliged to slightly alter one or two, and have also added several additional ones. No attempt has been made to give the statutes of the various states modifying the common law rules, as to do so would have materially increased the size of the book and have added but little, if any, to its value. I have in this particular followed the example of Mr. Wharton in his late valuable treatise on the law of evidence, by

merely indicating which of the common law rules have been most frequently modified by statutes, and also what the general tenor of those statutes is.

My only excuse for altering the text of another writer is, that I could think of no other way to accomplish nearly so well the end I have in view. To have the law stated one way in the text, and then on almost every other page to have it contradicted or modified by foot notes, would obviously be in direct variance with the whole purpose of this work, which is to *express as nearly as possible in the form of a statute the existing American Law of Evidence.* If, on the other hand, I had undertaken to re-write the entire book, I am modest enough to believe that the result of my labors would not have been nearly so valuable as that attained by the course adopted, and I therefore claim the same right to incorporate the greater part of Sir James Stephen's work into my own, which Judge W. Pitt Taylor had to adopt whole sections from Professor Greenleaf's treatise as a part of his. As, however, I have no wish either to appear as claiming any of the credit due Sir James Stephen for his work, or to make him seem in any way responsible for whatever errors or misstatements I may have made, I have inclosed in brackets all my additions to the text.

The articles in which the English text remains unaltered are Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 19, 22, 23, 24, 26, 27, 29, 31, 39, 40, 41, 43, 44, 45, 46, 50, 51, 54, 59, 60, 61, 62, 63, 64, 65, 68, 70, 72, 73, 74, 78, 85, 86, 87, 88, 90, 91, 92, 93, 95,

96, 97, 98, 99, 101, 102, 103, 104, 106, 116, 134, 136, 137, 138 and 139. The alterations in 30, 31, 34, 100 and 115 are merely verbal, in no manner altering the sense, being the substitution of equivalent words, such as "state" for "crown," "counsel" for "barrister," and the like. The alterations made in articles 11, 18, 56, 79, 105, 131 and 143 consist in the omission of paragraphs based upon recent English statutes inapplicable to this country, and in article 75 the words, "except in peerage cases," are only omitted. The articles entirely re-written are Nos. 20, 36, 37, 38, 52, 58, 69, 76, 80, 81, 82, 83, 84, 109, 110, 111, 112, 113, 119, 122, 123, 124 and 125. Articles Nos. 140, 141 and 142, on depositions, are omitted as inapplicable to the practice in this country, which, being regulated by the statutes of the United States and of the several states, is, in this particular, too much diversified to be included in the present work.

As this volume is intended largely for use at the trial table, I have always in citing cases (except when they are very short), given both the page of the volume of reports on which is the syllabus of the case, and also that containing the particular part of the opinion referred to. I have also added, in an appendix, the fourth and seventeenth sections of the statute of frauds, which it is often convenient to have at hand when discussing questions of evidence.

Sir James Stephen's original Introduction, his Preface to his third edition, and his Appendix of Notes, have been retained, excepting note xxvi, which is

explanatory of an article entirely re-written, and the latter half of note xli, which refers only to the interpretation and effect of certain English statutes in no respect applicable to this country.

W. R.

1 St. Paul St., Baltimore.
June 16th, 1879.

PREFACE TO THE THIRD EDITION.

As there have been no material changes in the Law of Evidence since the publication of this work, the only alterations in the text made in this edition are the insertion of three new articles, viz:—62 A on conversations by telephone, 62 B on illustration or confirmation of oral testimony by inspection, view or photographs, and 110 A on incompetency of parties to negotiable instruments to impeach them, and by adding to Article 64 a new paragraph relating to telegrams.

I have incorporated in the notes all the changes (so far as applicable to American law) which appear in the Sixth Edition of Mr. Justice Stephen's work including references to late English cases, decisions down to 1893, and have also added a number of late American cases, some from the Supreme Court of the United States and others reported in the American State Reports, most of the latter being fully annotated by Mr. Freeman.

W. R.

216 ST. PAUL ST., BALTIMORE,
Sept. 3, 1896.

Sir James Fitzjames Stephen's Introduction.

In the years 1870–1871 I drew what afterwards became the Indian evidence act (act 1 of 1872). This act began by repealing (with a few exceptions) the whole of the law of evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since September, 1872. I am informed that it is generally understood, and has required little judicial commentary or exposition.

In the autumn of 1872, Lord Coleridge (then attorney-general) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The bill was thus never made public, though I believe it was ordered to be printed.

It was drawn on the model of the Indian evidence act, and contained a complete system of law upon the subject of evidence.

In the latter part of 1873 Lord Coleridge was raised to his present position, and the bill has not been proceeded with by his successors.

It is perhaps scarcely necessary to say that I obtained Lord Coleridge's consent (which was most heartily and readily given) before I published this work.

The present work is founded upon this bill, though it differs from it in various respects. Lord Coleridge's bill proposed a variety of amendments of the existing law. These are omitted in the present work, which is intended to represent the existing law exactly as it stands. The bill, of course, was in the ordinary form of an act of Parliament. In the book I have allowed myself more freedom of expression, though I have spared no pains to make my statements as precise and complete in substance as if they were intended to be submitted to the Legislature.

The bill contained a certain number of illustrations, and Lord Coleridge's personal opinion was in their favor, though he had doubts as to the possibility of making them acceptable to Parliament. In the book I have much increased the number of the illustrations, and I have, in nearly every instance, taken cases actually decided by the courts for the purpose. In a few instances I have invented illustrations to suit my own purposes, but I have done so only in cases in which the practice of the courts is too well ascertained to be questioned. I think that illustrations might be used with advantage in acts of Parliament, though I am aware that

others take a different view; but, be this as it may, their use in a treatise cannot be disputed, as they not only bring into clear light the meaning of abstract generalities, but are, in many cases, themselves the authorities from which rules and principles must be deduced.

These explanations show, amongst other things, that I cannot honestly claim Lord Coleridge's authority for more than a general approval of this work. An act of Parliament which makes the law, and a treatise which states it, differ widely, and my work may, of course, be open to numerous objections, which would have been easily answered if they had been urged against Lord Coleridge's bill.

The novelty of the form and objects of the work may justify some explanations respecting it. In December, 1875, at the request of the council of legal education, I undertook the duties of professor of common law, at the inns of court, and I chose the law of evidence for the subject of my first course of lectures. It appeared to me that the draft bill which I had prepared for Lord Coleridge supplied the materials for such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labor disproportionate to its importance in relation to other branches of the law. No such work, so far as I know, exists; for all the existing books on the law of evidence are written on the usual model of English law books, which, as a general rule, aim at being collections more or less complete of all

the authorities upon a given subject, to which a judge would listen in an argument in court. Such works often become, sometimes under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which their writers naturally fall, of introducing into them everything which has any sort of connection, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference. The last edition of Mr. Taylor's work on evidence contains 1,797 royal 8vo pages. To judge from the table of cases, it must refer to about 9,000 judicial decisions, and it cites nearly 750 acts of Parliament. The last edition of "Roscoe's Digest of the Law of Evidence on the trial of Actions at Nisi Prius," contains 1,556 closely printed pages. The table of cases cited consists of seventy-seven pages, one of which contains the names of 152 cases, which would give a total of 11,704 cases referred to. There is, besides, a list of references to statutes which fills twenty-one pages more. "Best's Principles of the Law of Evidence," which disclaims the intention of adding to the number of practical works on the subject, and is said to be intended to examine the principles on which the rules of evidence are founded, contains 908 pages, and refers to about 1,400 cases.

When we remember that the law of evidence forms only one branch of the law of procedure, and that the substantive law which regulates rights and duties ought to be treated independently of it, it becomes obvious that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books on the subject. No doubt such knowledge is to be gained. Experience gives by degrees, in favorable cases, comprehensive acquaintance with the principles of the law with which a practitioner is conversant. He gets to see that it is shorter and simpler than it looks, and to understand that the innumerable cases which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles; but those who have gained knowledge of this kind have usually no opportunity to impart it to others. Moreover, they acquire it very slowly, and with needless labor themselves, and though knowledge so acquired is often specially vivid and well remembered, it is often fragmentary, and the possession of it not unfrequently renders those who have it skeptical as to the possibility, and even as to the expediency, of producing anything more systematic and complete.

Circumstances already mentioned have led me to put into a systematic form such knowledge of the subject as I had acquired, and my connection with the scheme of education established by the inns of court seems to impose upon me the duty of doing what I can to assist in their studies those who attend

my lectures. This work is the result. The labor bestowed upon it has, I may say, been in an inverse ratio to its size.

My object in it has been to separate the subject of evidence from other branches of the law with which it has commonly been mixed up; to reduce it into a compact systematic form, distributed according to the natural division of the subject matter; and to compress into precise definite rules, illustrated, when necessary, by examples, such cases and statutes as properly relate to the subject matter so limited and arranged. I have attempted, in short, to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which, at all events, will, I hope, be useful, not only to professional students, but to every one who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into questions of fact, as well as on every branch of litigation.

The law of evidence is composed of two elements, namely: first, an enormous number of cases, almost all of which have been decided in the course of the last 100 or 150 years, and which have already been collected and classified in various ways by a succession of text writers, the most recent of whom I have already named; secondly, a comparatively small number of acts of Parliament which have been passed in the course of the last thirty or forty years, and have effected a highly beneficial revolution in the law as it was when it attracted the denunciations of Bentham.

Writers on the law of evidence usually refer to statutes by the hundred, but the acts of parliament which really relate to the subject are but few. A detailed account of this matter will be found at the end of the volume, in note xlix.

The arrangement of the book is the same as that of the Indian evidence act, and is based upon the distinction between relevancy and proof, that is, between the question, What facts may be proved? and the question, How must a fact be proved assuming that proof of it may be given? The neglect of this distinction, which is concealed by the ambiguity of the word evidence (a word which sometimes means testimony and at other times relevancy), has thrown the whole subject into confusion, and has made what was really plain enough appear almost incomprehensible.

In my "Introduction to the Indian evidence act," published in 1872, and in speeches made in the Indian legislative council, I entered fully upon this matter, and I need not return to it here. I may, however, give a short outline of the contents of this work, in order to show the nature of the solution of the problem stated above at which I have arrived.

All law may be divided into substantive law, by which rights, duties, and liabilities are defined, and the law of procedure, by which the substantive law is applied to particular cases.

The law of evidence is that part of the law of procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides:

I. What facts may, and what may not, be proved in such cases;

II. What sort of evidence must be given of a fact which may be proved;

III. By whom and in what manner the evidence must be produced by which any fact is to be proved.

I. The facts which may be proved are facts in issue, or facts relevant to the issue.

Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the law of evidence except in certain cases:

1. Facts similar to, but not specifically connected with, each other. (*Res inter alios actæ.*)

2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay.*)

3. The fact that any person is of opinion that a fact exists. (*Opinion.*)

4. The fact that a person's character is such as to render conduct imputed to him probable or improbable. (*Character.*)

To each of these four exclusive rules there are, however, important exceptions, which are defined by the law of evidence.

II. As to the manner in which a fact in issue or relevant fact must be proved.

Some facts need not be proved at all, because the court will take judicial notice of them, if they are relevant to the issue.

Every fact which requires proof must be proved either by oral or by documentary evidence.

Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies.

Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in court for inspection.

Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves.

Whenever any public or private transaction has been reduced to a documentary form, the document

in which it is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document.

III. As to the person by whom, and the manner in which the proof of a particular fact must be made.

When a fact is to be proved, evidence must be given of it by the person upon whom the burden of proving it is imposed, either by the nature of the issue or by any legal presumption, unless the fact is one which the party is estopped from proving by his own representations, or by his conduct, or by his relation to the opposite party.

The witnesses by whom a fact is to be proved must be competent. With very few exceptions, every one is now a competent witness in all cases. Competent witnesses, however, are not in all cases compelled or even permitted to testify.

The evidence must be given upon oath, or in certain excepted cases without oath. The witnesses must be first examined in chief, then cross-examined, and then re-examined. Their credit may be tested in certain ways, and the answers which they give to questions affecting their credit may be contradicted in certain cases and not in others.

This brief statement will show what I regard as constituting the law of evidence properly so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows:

I regard the question, "What may be proved under particular issues?" (which many writers treat as part of the law of evidence) as belonging partly to the subject of pleading, and partly to each of the different branches into which the substantive law may be divided.

A is indicted for murder and pleads not guilty. This plea puts in issue, among other things, the presence of any state of mind describable as malice aforethought, and all matters of justification or extenuation.

Starkie and Roscoe treat these subjects at full length, as supplying answers to the question, "What can be proved under an issue of not guilty on an indictment for murder?" Mr. Taylor does not go so far as this; but a great part of his book is based upon a similar principle of classification. Thus Chapters I and II of Part II are rather a treatise on pleading than a treatise on evidence.

Again, I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the substantive law, and to be unintelligible, except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that, speaking generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the law of evidence. It belongs to the criminal law. In the same way numerous presumptions as to rights of property (in particular

easements and incorporeal hereditaments) belong not to the law of evidence but to the law of real property. The only presumptions which, in my opinion, ought to find a place in the law of evidence, are those which relate to facts merely as facts, and apart from the particular rights which they constitute. Thus the rule that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of a marriage, an action of ejectment by a reversioner against a tenant *pur auter vie*, the admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the substantive law.

Practice, again, appears to me to differ in kind from the law of evidence. The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered, etc., have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in codes of civil and criminal procedure.

A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of "Public Documents," Mr. Taylor gives amongst other things a list of all, or most, of the

statutory provisions which render certificates or certified copies admissible in particular cases.

To take an illustration at random, section 1458 begins thus: "The registration of medical practitioners under the medical act of 1858, may be proved by a copy of the 'Medical Register,' for the time being, purporting," etc. I do not wish for a moment to undervalue the practical utility of such information, or the industry displayed in collecting it; but such a provision as this appears to me to belong not to the law of evidence, but to the law relating to medical men. It is matter rather for an index or schedule than for a legal treatise, intended to be studied, understood, and borne in mind in practice.

On several other points the distinction between the law of evidence and other branches of the law is more difficult to trace. For instance, the law of estoppel, and the law relating to the interpretation of written instruments, both run into the law of evidence. I have tried to draw the line by dealing in the case of estoppels with estoppels *in pais* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such; and in regard to the law of written instruments by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence.

The result is no doubt to make the statement of the law much shorter than is usual. I hope, however, that competent judges will find that, as far as it goes,

the statement is both full and correct. As to brevity, I may say, in the words of Lord Mansfield: "The law does not consist of particular cases, but of general principles which are illustrated and explained by those cases."*

Every one will express somewhat differently the principles which he draws from a number of illustrations, and this is one source of that quality of our law which those who dislike it describe as vagueness and uncertainty, and those who like it as elasticity. I dislike the quality in question, and I used to think that it would be an improvement if the law were once for all enacted in a distinct form by the Legislature, and were definitely altered from time to time as occasion required. For many years I did my utmost to get others to take the same view of the subject, but I am now convinced by experience that the unwillingness of the Legislature to undertake such an operation proceeds from a want of confidence in its power to deal with such subjects, which is neither unnatural nor unfounded. It would be as impossible to get in Parliament a really satisfactory discussion of a bill codifying the law of evidence as to get a committee of the House to paint a picture. It would, I am equally well satisfied, be quite as difficult at present to get Parliament to delegate its powers to persons capable of exercising them properly. In the meanwhile the courts can decide only upon cases as they actually occur, and generations

* *R. v. Bembridge*, 3 Doug., 332.

may pass before a doubt is set at rest by a judicial decision expressly in point. Hence, if anything considerable is to be done towards the reduction of the law to a system, it must, at present at least, be done by private writers.

Legislation proper is under favorable conditions the best way of making the law, but if that is not to be had, indirect legislation, the influence on the law of judges and legal writers who deduce, from a mass of precedents, such principles and rules as appear to them to be suggested by the great bulk of the authorities, and to be in themselves rational and convenient, is very much better than none at all. It has, indeed, special advantages, which this is not the place to insist upon. I do not think the law can be in a less creditable condition than that of an enormous mass of isolated decisions, and statutes assuming unstated principles; cases and statutes alike being accessible only by elaborate indexes. I insist upon this because I am well aware of the prejudice which exists against all attempts to state the law simply, and of the rooted belief which exists in the minds of many lawyers that all general propositions of law must be misleading, and delusive, and that law books are useless except as indexes. An ancient maxim says, "*Omnis definitio in jure periculosa.*" Lord Coke wrote, "It is ever good to rely upon the books at large; for many times *compendia sunt dispendia*, and *Melius est petere fontes quam sectari rivulos.*" Mr. Smith chose this expression as the motto of his "Leading Cases," and the sentiment which it embodies has exercised immense

influence over our law. It has not perhaps been sufficiently observed that when Coke wrote, the "books at large," namely, the "Year Books" and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by the Council of Law Reporting; and the *compendia* (such books, say, as Fitzherbert's "Abridgment") were merely abridgments of the cases in the "Year Books" classified in the roughest possible manner, and much inferior both in extent and arrangement to such a book as Fisher's "Digest." *

In our own days it appears to me that the true *fontes* are not to be found in reported cases, but in the rules and principles which such cases imply, and that the cases themselves are the *rivuli*, the following of which is a *dispendium*. My attempt in this work has been emphatically *petere fontes*, to reduce an important branch of the law to the form of a connected system of intelligible rules and principles.

Should the undertaking be favorably received by the profession and the public, I hope to apply the same process to some other branches of the law; for the more I study and practice it, the more firmly am I convinced of the excellence of its substance and the defects of its form. Our earlier writers, from Coke

* Since the beginning of 1865 the Council has published eighty-six volumes of Reports. The Year Books from 1307-1535, 228 years, would fill not more than twenty-five such volumes. There are also ten volumes of the Statutes since 1865 (May, 1876). There are now (Feb., 1877) at least ninety-three volumes of Reports and eleven volumes of Statutes.

to Blackstone, fell into the error of asserting the excellence of its substance in a fulsome and exaggerated strain, whilst they showed a total insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognize the substantial merits of the system which he attacked; and it is obvious to me that he had not that mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talent, approaching closely to genius.

During the last twenty-five years Bentham's influence has to some extent declined, partly because some of his books are like exploded shells, buried under the ruins which they have made, and partly because under the influence of some of the ablest and most distinguished of living authors, great attention has been directed to legal history, and in particular to the study of Roman law. It would be difficult to exaggerate the value of these studies, but their nature and use is liable to be misunderstood. The history of the Roman law no doubt throws great light on the history of our own law; and the comparison of the two great bodies of law, under one or the other of which the laws of the civilized world may be classified, cannot fail to be in every way most instructive; but the history of by-gone institutions is valuable mainly because it enables us to understand, and so to improve existing institutions. It would be a com-

plete mistake to suppose either that the Roman Law is in substance wiser than our own, or that in point of arrangement and method the Institutes and the Digest are anything but warnings. The pseudo-philosophy of the Institutes, and the confusion of the Digest, are, to my mind, infinitely more objectionable than the absence of arrangement and of all general theories, good or bad, which distinguish the law of England.

However this may be, I trust the present work will show that the law of England on the subject to which it refers is full of sagacity and practical experience, and is capable of being thrown into a form at once plain, short, and systematic.

I wish, in conclusion, to direct attention to the manner in which I have dealt with such parts of the statute law as are embodied in this work. I have given, not the very words of the enactments referred to, but what I understand to be their effect, though in doing so I have deviated as little as possible from the actual words employed. I have done this in order to make it easier to study the subject as a whole. Every act of Parliament which relates to the law of evidence assumes the existence of the unwritten law. It cannot, therefore, be fully understood, nor can its relation to other parts of the law be appreciated till the unwritten law has been written down so that the provisions of particular statutes may take their places as parts of it. When this is done, the statute law itself admits of, and even requires, very great abridgment. In many cases the result of a

number of separate enactments may be stated in a line or two. For instance, the old common law as to the incompetency of certain classes of witnesses was removed by parts of six different acts of Parliament—the net result of which is given in five short articles (106–110).

So, too, the doctrine of incompetency for peculiar or defective religious belief has been removed by many different enactments the effect of which is shown in one article (123).

The various enactments relating to documentary evidence (see Chapter X) appear to me to become easy to follow and to appreciate when they are put in their proper places in a general scheme of the law, and arranged according to their subject matter. By rejecting every part of an act of Parliament except the actual operative words which constitute its addition to the law, and by setting it (so to speak) in a definite statement of the unwritten law of which it assumes the existence, it is possible to combine brevity with substantial accuracy and fullness of statement to an extent which would surprise those who are acquainted with acts of Parliament only as they stand in the Statute Book.* At the same time I should warn any one who may use this book for the purposes of actual practice in or out of court, that he would do well to refer to the very words of the statutes embodied in it. It is very possible that, in

* Twenty articles of this work represent all that is material in the ten acts of Parliament, containing sixty-six sections, which have been passed on the subject to which it refers. For the detailed proof of this, see note xlviii.

stating their effect instead of their actual words, I may have given in some particulars a mistaken view of their meaning.

Such are the means by which I have endeavored to make a statement of the law of evidence which will enable not only students of law, but I hope any intelligent person who cares enough about the subject to study attentively what I have written, to obtain from it a knowledge of that subject at once comprehensive and exact—a knowledge which would enable him to follow in an intelligent manner the proceedings of courts of justice, and which would enable him to study cases and use text-books of the common kind with readiness and ease. I do not say more than this. I have not attempted to follow the matter out into its minute ramifications, and I have avoided reference to what after all are little more than matters of curiosity. I think, however, that any one who makes himself thoroughly acquainted with the contents of this book, will know fully and accurately all the leading principles and rules of evidence which occur in actual practice.

If I am entitled to generalize at all from my own experience, I think that even those who are already well acquainted with the subject will find that they understand the relations of its different parts, and therefore the parts themselves more completely than they otherwise would, by being enabled to take them in at one view, and to consider them in their relation to each other.

J. F. S.

4 PAPER BUILDINGS, TEMPLE.
May, 1876.

CONTENTS.

PART I.
RELEVANCY.

CHAPTER I.—PRELIMINARY.

ART. 1. Definition of Terms . . . Page 3–5

CHAPTER II.—OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

ART. 2. Facts in issue and Facts relevant to the issue may be proved—3. Relevancy of Facts forming part of the same transaction as Facts in issue—4. Acts of Conspirators—5. Title—6. Customs—7. Motive, preparation, subsequent conduct—8. Statements accompanying acts, complaints, statements in presence of a person—9. Facts necessary to explain or introduce relevant Facts . 6–19

CHAPTER III.—OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN CASES.

ART. 10. Similar but unconnected Facts—11. Acts showing intention, good faith, etc.—12. Facts showing system, negligence, etc.—13. Existence of course of business when deemed to be relevant 20–28

CHAPTER IV.—HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ART. 14. Hearsay and the contents of documents irrelevant, Page 29

Section I.—*Hearsay when Relevant.*

ART. 15. Admissions defined—16. Who may make admissions on behalf of others, and when—17. Admissions by agents and persons jointly interested with parties—18. Admission by strangers—19. Admission by person referred to by party—20. Admissions made without prejudice, or under duress—21. Confessions defined—22. Confession caused by inducement, threat, or promise, when irrelevant in Criminal Proceeding—23. Confessions made upon oath, etc.—24. Confession made under a promise of secrecy—25. Statements by deceased, insane, or absent persons when deemed to be relevant—26. Dying declaration as to cause of death—27. Declarations made in the course of business or professional duty—28. Declarations against interest—29. Declarations by testators as to contents of will—30. Declarations as to public and general rights—31. Declarations as to pedigree—32. Evidence given in former proceeding when relevant 30–62

Section II.—*Statements in Books, Documents and Records, when relevant.*

ART. 33. Recitals of public facts in statutes and proclamations—34. Relevancy of entry in public record made in performance of duty—35. Relevancy of statements in works of history and science, maps, charts and plans—36. Entries in books of corporations—37. Entries by party in his own books—38. Entries made in his own books by a party since deceased, or insane—39. "Judgment"—40. All judgments conclusive proof of their legal effect—41. Judgments conclusive as between parties and privies of facts forming ground of judgment—42. Statements in judgments irrelevant as between strangers, except in Admiralty and other

cases *in rem*—43. Effect of judgment not pleaded as an estoppel—44. Judgments generally deemed to be irrelevant as between strangers—45. Judgments conclusive in favor of Judge—46. Fraud, collusion, or want of jurisdiction may be proved—47. Judgments of sister states and foreign judgments . . . . . Page 63–80

CHAPTER V.—OPINIONS, WHEN RELEVANT AND WHEN NOT.

ART. 48. Opinion generally irrelevant—49. Opinions of experts on points of science or art—50. Facts bearing upon opinions of experts—51. Opinion as to handwriting, when deemed to be relevant—52. Comparison of handwritings—53. Opinion as to existence of marriage, when relevant—54. Grounds of opinion, when deemed to be relevant 81–89

CHAPTER VI.—CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT.

ART. 55. Evidence of character generally irrelevant in Civil Cases—56. Evidence of character in Criminal Cases—57. Character as affecting damages 90–92

PART II.

ON PROOF.

CHAPTER VII.—FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE.

ART. 58. Of what Facts the court takes judicial notice—59. As to proof of such Facts—60. Evidence need not be given of Facts admitted . . . . . Page 93-97

CHAPTER VIII.—OF ORAL EVIDENCE.

ART. 61. Proof of Facts by oral evidence—62. Oral evidence must be direct—62 A. Conversation by Telephone—62 B. Illustration or confirmation of oral Testimony by Inspection, View or Photographs 100-101*d*

CHAPTER IX.—OF DOCUMENTARY EVIDENCE—PRIMARY AND SECONDARY, AND ATTESTED DOCUMENTS.

ART. 63. Proof of contents of documents—64. Primary evidence—65. Proof of documents by primary evidence—66. Proof of execution of attested documents—67. Cases in which attesting witness need not be called—68. Proof when attesting witness denies the execution—69. Proof of attested document acknowledged under statute—70. Secondary evidence of documents—71. Cases in which secondary evidence relating to documents may be given—72. Rules as to notice to produce 102-113

CHAPTER X.—PROOF OF PUBLIC DOCUMENTS.

ART. 73. Proof of public documents—74. Production of document itself—75. Examined copies—76. General records of the nation—77. Exemplifications—78. Copies equivalent to exemplifications—79. Certified copies—80. Little and Brown's edition of U. S. Laws—81. Legislative acts of states and territories—82. Records and judicial proceedings of state courts, etc.—83. Public records of state, etc., not judicial—84. Foreign acts of state, judgments, etc. 114-121

CHAPTER XI.—PRESUMPTIONS AS TO DOCUMENTS.

ART. 85. Presumption as to date of a document — 86. Presumption as to stamp of a document — 87. Presumption as to sealing and delivery of deeds — 88. Presumption as to documents thirty years old — 89. Presumption as to alterations . . . . . Page 122-126

CHAPTER XII.—OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE.

ART. 90. Evidence of terms of contracts, grants and other dispositions of property reduced to a documentary form — 91. What evidence may be given for the interpretation of documents — 92. Cases to which articles 90 and 91 do not apply 127-139

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.—BURDEN OF PROOF.

ART. 93. He who affirms must prove—94. Presumption of innocence—95. On whom the general burden of proof lies—96. Burden of proof as to particular Fact—97. Burden of proving Fact to be proved to make evidence admissible—97A. Burden of proof when parties stand in a fiduciary relation . . . . . Page 140–146

CHAPTER XIV.—ON PRESUMPTIONS AND ESTOPPELS.

ART. 98. Presumption of legitimacy—99. Presumption of death from seven years' absence—100. Presumption of lost grant—101. Presumption of regularity and of deeds to complete title—102. Estoppel by conduct—103. Estoppel of tenant and licensee—104. Estoppel of acceptor of bill of exchange—105. Estoppel of bailee, agent and licensee 147–157

CHAPTER XV.—OF THE COMPETENCY OF WITNESSES.

ART. 106. Who may testify—107. What witnesses are incompetent—108. Competency in Criminal Cases—109. Husband and wife—110. Communications during marriage—110A. Parties to Negotiable Instruments incompetent to impeach them—111. Judges, their competency and privileges—112. Evidence as to affairs of state—113. Information as to commission of offenses—114. Competency of jurors—115. Professional communications—116. Confidential communications with legal advisers—117. Clergymen and medical men—118. Production of documents by witness not a party—119. Production of documents in the possession of attorneys or solicitors—120. Witness not to be compelled to criminate himself—121. Corroboration, when required—122. Number of witnesses . 158–174

CHAPTER XVI.—OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION OF WITNESSES.

ART. 123. Evidence to be upon oath, except in certain cases — 124. Form of oaths — 125. How oral evidence may be taken — 126. Examination in chief, cross-examination and re-examination — 127. To what matters cross-examination and re-examination must be directed — 128. Leading questions — 129. Questions lawful in cross-examination — 130. Exclusion of evidence to contradict answers to questions testing veracity — 131. Statements inconsistent with present testimony may be proved — 132. Cross-examination as to previous statements in writing — 133. Impeaching credit of witness — 134. Offenses against women — 135. What matters may be proved in reference to declarations relevant under articles 25–32 — 136. Refreshing memory — 137. Right of adverse party as to writing used to refresh memory — 138. Giving, as evidence, document called for and produced on notice — 139. Using, as evidence, a document, production of which was refused on notice, Page 175–191

CHAPTER XVII.—OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ART. 140 192

APPENDIX A.

Fourth and seventeenth sections of Statute of Frauds, 193–194

SIR JAMES F. STEPHEN'S APPENDIX OF NOTES . 195

ADDITIONAL NOTES BY AMERICAN EDITOR . . 255

INDEX 257

A DIGEST

OF THE

LAW OF EVIDENCE

AS

Established in the United States.

A DIGEST

OF THE

LAW OF EVIDENCE

AS ESTABLISHED IN THE UNITED STATES.

PART I.

RELEVANCY.

CHAPTER I.

PRELIMINARY.

ARTICLE 1.*

DEFINITION OF TERMS.

In this book the following words and expressions are used in the following senses unless a different intention appears from the context.

"Judge" includes all persons authorized to take evidence, either by law or by the consent of the parties.

"Fact" includes the fact that any mental condition of which any person is conscious exists.

"Document" means any substance having any

* See Note I.

matter expressed or described upon it by marks capable of being read.

"Evidence" means—

(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) Documents produced for the inspection of the court or judge;

such documents are called documentary evidence;

"Conclusive proof" means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.

"A Presumption" means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.

The expression "facts in issue" means—

(1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other;

(2) In actions in which there are no pleadings or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the existence, non-existence, nature, or extent of any right, liabil-

ity, or disability asserted or denied in any such case would by law follow.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

CHAPTER II.

OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE

ARTICLE 2.*

FACTS IN ISSUE AND FACTS RELEVANT TO THE ISSUE MAY BE PROVED.

Evidence may be given in any proceeding of any fact in issue,

and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed to be irrelevant,

and of any fact hereinafter declared to be deemed to be relevant to the issue whether it is or is not relevant thereto.

Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case. [A]

Illustration.

(*a*) A is indicted for the murder of B, and pleads not guilty. The following facts may be in issue: The fact that A killed B; the fact that at the time when A killed B he was prevented by disease from knowing right from wrong; the fact that A

* See Note II.

[A] *Lucas v. Brooks*, 18 Wall., 436, 454.

had received from B such provocation as would reduce his offense to manslaughter.

The fact that A was at a distant place at the time of the murder would be relevant to the issue; the fact that A had a good character would be deemed to be relevant; the fact that C on his deathbed declared that C and not A murdered B would be deemed not to be relevant.

ARTICLE 3.

RELEVANCY OF FACTS FORMING PART OF THE SAME TRANSACTION AS FACTS IN ISSUE.

A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.

Every fact which is part of the same transaction as the facts in issue, is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay. [A]

Whether any particular fact is or is not part of the same transaction is a question of law [to be decided by the court with reference to the special circumstances of the case before it. No authori-

[A] *Insurance Co. v. Moseley*, 8 Wall., 397, 405; *Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 U. S., 99, 105; *People v. Vernon*, 35 Cal., 49; 95 Am. D., 1, note; *Augusta Factory v. Barnes*, 72 Ga., 217; 53 Am. R., 838; *Ward v. White*, 86 Va., 212; 19 Am. St. R., 833; *Peabody v. Dewey*, 153 Ills., 657.

tative rule of decision has yet been stated which is of general application in such cases.] [A]

When a question as to the ownership of land depends on the application to it of a particular presumption capable of being rebutted, the fact that it does not apply to other neighboring pieces of land similarly situated, is deemed to be relevant.

Illustrations.

(*a*) The question is, whether A murdered B by shooting him.

The fact that a witness in the room with B, just before he was shot, saw a man with a gun in his hand pass a window opening into the room in which B was shot, and thereupon exclaimed, "That's the butcher!" (a name by which A was known), is deemed to be relevant.[1]

(*b*) The question was whether A cut B's throat or whether B cut it himself.

A statement made by B when running out of the room in which his throat was cut, immediately after it had

[1] R. *v. Foulkes*, per Campbell, C. J., Leicester Spring Assizes, 1856. Ex relatione O'Brien, Serjt.

[A] See Illustrations *b*, *d* and *e*. The words in brackets are substituted for the following in the corresponding clause of the article in Stephen's 5th Edition: "Upon which no principle has been stated by authority, and on which single judges have given different decisions." See also *Butler v. Manhattan Ry. Co.*, 143 N. Y., 417; 42 Am. St. R., 738. This Article, supplemented by Article 8, is intended to include all the items generally referred to by the term "*Res gestae*," as to which see Note V., p. 201.

been cut, was not allowed to be proved by Cockburn, L. C. J.[1] [A]

(*c*) The question was whether A committed manslaughter on B by carelessly driving over him.

A statement made by B as to the cause of his accident, as soon as he was picked up, was allowed to be proved by Park, J., Gurney, B , and Patterson, J., though it was not a dying declaration within article 26.[2]

[(*d*) The question was whether A., the assured, died from the effects of an accidental fall down stairs in the night or from natural causes.

A statement made by A to his wife after returning to his room at night, that he had fallen down the back stairs and almost killed himself; that he had hit the back part of his head in falling down stairs, was deemed to be relevant as against the Insurance Co. [B]

(*e*) The question was, whether a railroad accident, by which A, a passenger, was injured, was attributable to the negligence of the company.

The declaration of the engineer of the locomotive of the train which met with the accident, as to the speed with which it was running at the time of the accident, made between ten and thirty minutes afterwards, not deemed to be relevant against the railroad company.] [c]

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[1] *R. v. Bedingfield*, Suffolk Assizes, 1879. The propriety of this decision was the subject of two pamphlets, one, by W. Pitt Taylor, who denied, the other by the Lord Chief Justice, who maintained it.

[2] *R. v. Foster*, 6 C. & P., 325.

[A] See Am. Law Review, vol. xiv., p. 817, and vol. xv., pp. 1, 71, articles on this case by Prof. Thayer. Similar statements made by a man who had been shot were admitted in evidence in *Kirby v. Commonwealth*, 77 Va., 681; 46 Am. R., 747; *Contra People v. Ah Lee*, 60 Cal., 85.

[B] *Insurance Co. v. Mosley*, 8 Wall., 397, 403.

[C] *Vicksburg & Meridian R. R. v. O'Brien*, 119 U. S., 99;

(*f*) The question is, whether A, the owner of one side of the river, owns the entire bed of it, or only half the bed, at a particular spot. The fact that he owns the entire bed lower down is deemed to be relevant.[1]

(*g*) The question is, whether a slip of land by the roadside belongs to the lord of the manor or to the owner of the adjacent land. The fact that the lord of the manor owned other parts of the slip of land by the side of the same road is deemed to be relevant.[2]

ARTICLE 4.*

ACTS OF CONSPIRATORS.

When two or more persons conspire together to commit any offense or actionable wrong, everything said, done, or written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done or written by every one, and is deemed to be a relevant fact as against each of them; but statements as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant

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* See Note III.

[1] *Jones v. Williams*, 2 M. & W., 326.

[2] *Doe v. Kemp*, 7 Bing., 332; 2 Bing. N. C., 102.

Durkee v. Central Pacific R. R. Co., 69 Cal., 533; 58 Am. R., 562.

under this article may not be given until the judge is satisfied that, apart from them, there are primâ facie grounds for believing in the existence of the conspiracy to which they relate. [A]

Illustrations.

(*a*) The question is, whether A and B conspired together to cause certain imported goods to be passed through the custom house on payment of too small an amount of duty.

The fact that A made in a book a false entry, necessary to be made in that book in order to carry out the fraud, is deemed to be a relevant fact as against B.

The fact that A made an entry on the counterfoil of his cheque book showing that he had shared the proceeds of the fraud with B, is deemed not to be a relevant fact as against B.[1]

(*b*) The question is, whether A committed high treason by imagining the king's death; the overt act charged is that he presided over an organized political agitation calculated to produce a rebellion, and directed by a central committee through local committees.

The facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by and by the direction of persons shown to have acted in concert with A, are deemed to be relevant facts as against A, though he was not present at those transactions, and took no part in them personally.

An account given by one of the conspirators in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to A's notice, is deemed not to be relevant as against A.[2]

[1] *R. v. Blake*, 6 Q. B., 137–40.

[2] *R. v. Hardy*, 24 S. T., *passim*, but see particularly 451–8.

[A] *American Fur Co. v. U. S.*, 2 Peters, 358, 365; *Crowninshield's Case*, 10 Pick., 407; *Lincoln v. Claflin*, 7 Wall., 132, 139; *Nudd v. Burrows*, 91 U. S., 426, 438; *Spies v. People*, 122 Ills., 1; 3 Am. St. R., 320; *Logan v. U. States*, 144 U. S., 263, 309.

ARTICLE 5.*

TITLE.

When the existence of any right of property, or of any right over property is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence or renders its existence improbable, is deemed to be relevant. [A]

Illustrations.

(*a*) The question is, whether A has a right of fishery in a river.

An ancient *inquisitio post mortem* finding the existence of a right of fishery in A's ancestors, licenses to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant.[1]

(*b*) The question is, whether A owns land.

The fact that A's ancestors granted leases of it is deemed to be relevant.[2]

* See Note IV.

[1] *Rogers v. Allen*, 1 Camp., 309.

[2] *Doe v. Pulman*, 3 Q. B., 622, 623, 626 (citing *Duke of Bedford v. Lopes*). The document produced to show the lease was a counterpart signed by the lessee. See *post*, art. 64.

[A] 2 Gr. Ev., sections 303 to 335 and 553 to 558, both inclusive, with American cases cited in notes; 2 Whar. Ev., section 1331, etc.

(*c*) The question is, whether there is a public right of way over A's land.

The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all deemed to be relevant.[1]

ARTICLE 6.

CUSTOMS.

When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested. [A.]

Illustrations.

(*a*) The question is, whether, by the custom of borough-English as prevailing in the manor of C, A is heir to B.

The fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A stood to B, is deemed to be relevant.[2]

(*b*) The question was, whether, by the custom of the country, a tenant farmer, not prohibited by his lease from doing so, might pick and sell surface flints, minerals being reserved by his lease. The fact that under similar provisions in leases of neighbouring farms, flints were taken and sold, is deemed to be relevant.[3]

[1] Common practice. As to the title deeds, *Brough v Lord Scarsdale*, Derby Summer Assizes, 1865.

[2] *Muggleton v. Barnett*, 1 H. & N., 282, and see *Johnston v. Lord Spencer*, L. R. 30 Ch. Div., 581. For a late case of evidence of a custom of trade, see *Ex Parte Powell, in re Matthews*, L. R. 1 Ch. D., 501.

[3] *Tuckar v. Linger*, L. R. 21 Ch. Div. 18, and see p. 37.

[A] *Knowles v. Dow*, 22 N. H. (2 Fost.), 403; 55 Am. D., 163; *Governor v. Withers*, 5 Gratt., 24; 50 Am. D., 95, note; *Adams v. Pittsburg Iron Co.*, 95 Pa. St., 348; 40 Am. R., 662.

ARTICLE 7.

MOTIVE, PREPARATION, SUBSEQUENT CONDUCT.

When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say—

any fact which supplies a motive for such an act, or which constitutes preparation for it;[1] [A]

any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it or by the authority of that person.[2] [B]

Illustrations.

(*a*) The question is, whether A murdered B.

The facts that, at the instigation of A, B murdered C twenty-five years before B's murder, and that A at or before that time used expressions showing malice against C, are deemed to be relevant as showing a motive on A's part to murder B.[3]

(*b*) The question is, whether A committed a crime.

The fact that A procured the instruments with which the crime was committed is deemed to be relevant.[4]

(*c*) A is accused of a crime.

The facts that, either before or at the the time of, or after the alleged crime, A caused circumstances to exist tending to give to the facts of the case an appearance favorable to himself, or that he destroyed or concealed things or papers, or

[1] Illustrations (*a*) and (*b*).
[2] Illustrations (*c*) (*d*) and (*e*).
[3] *R. v. Clewes*, 4 C. & P., 221.
[4] *R. v. Palmer* (*passim*).

[A] *McKee v. People*, 36 N. Y., 113; *Kolb v. Whiteley*, 3 G. & J., 188, 195; *Moore v. U. States*, 150 U. S., 57.

[B] *Jewell v. Jewell*, 1 How., 219, 232; *Mitchum v. State*, 11 Ga., 615, 621; *Furnas v. Durgin*, 119 Mass., 500; *Com. v. Webster*, 5 Cush., 295; 52 Am. D., 711.

prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence, are deemed to be relevant.[1]

(*d*) The question is, whether A committed a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, and the manner in which he conducted himself when statements on the subject were made in his presence and hearing, are deemed to be relevant.[2]

(*e*) The question is, whether A suffered damage in a railway accident.

The fact that A conspired with B, C and D to suborn false witnesses in support of his case is deemed to be relevant,[3] as conduct subsequent to a fact in issue tending to show that it had not happened.

ARTICLE 8.*

STATEMENTS ACCOMPANYING ACTS, COMPLAINTS, STATEMENTS IN PRESENCE OF A PERSON.

Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it may be proved if they are necessary to understand it.[4] [A]

*See Note V [on Res Gestae].

[1] *R. v. Patch*, Wills Circ. Ev., 230; *R. v. Palmer*, *ub. sup.* (*passim*).

[2] Common practice.

[3] *Moriarty v. London, Chatham & Dover Ry. Co.*, L. R., 5 Q. B., 314; compare *Gery v. Redman*, L. R. 1 Q. B. D., 161.

[4] Illustrations (*a*) and (*b*). Other statements made by such persons are relevant or not according to the rules as to statements hereinafter contained. See ch. iv., *post.*

[A] *Bank v. Kennedy*, 17 Wall., 19, 24; *Lund v. Tyngsborough*, 9 Cush., 26, 41; *McDowell v. Goldsmith*, 6 Md. 319, 338; 61 Am. D., 305; *Bragg v. Massie*, 38 Ala., 89; 79 Am. D., 82; *Hamilton v. State*, 36 Ind., 280; 10 Am. R., 22, note, but see *Pinney v. Jones*, 64 Conn., 545; 42 Am. St. R., 209.

In criminal cases the conduct of the person against whom the offense is said to have been committed, and in particular the fact that he made a complaint soon after the offense to persons to whom he would naturally complain, are deemed to be relevant; but the terms of the complaint itself seem to be deemed to be irrelevant.[1] [A]

When a person's conduct is in issue or is deemed to be relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected, are deemed to be relevant.[2] [B]

Illustrations.

(*a*) The question is, whether A committed an act of bankruptcy, by departing the realm with intent to defraud his creditors.

Letters written during his absence from the realm, indicating such an intention, are deemed to be relevant facts.[3]

(*b*) The question is, whether A was sane.

The fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted

[1] Illustration (*c*).

[2] *R. v. Edmunds*, 6 C. and P., 164; *Neil v. Jakle*, 2 C. and K., 709.

[3] *Rawson v. Haigh*, 2 Bing., 99; *Bateman v. Bailey*, 5 T. R., 512.

[A] *Bucio v. People*, 41 N. Y. (2 Hand), 265; *State v. Knapp*, 45 N. H., 148, 155; *Johnson v. State*, 17 Ohio, 593; *Com. v. McPike*, 3 Cush., 181, 184; 50 Am. D., 727; *Oleson v. State*, 11 Neb., 276; 38 Am. R., 366; *People v. O'Sullivan*, 104 N. Y., 481; 58 Am. R., 530.

[B] *People v. Shea*, 8 Cal., 538; *Friend v. Hamill*, 34 Md., 298, 308; *Knowlton v. Clark*, 25 Ind., 391; *Kelley v. People*, 55 N. Y., 565; 14 Am. R., 342.

upon are deemed to be relevant, as statements accompanying and explaining such conduct.[1]

(*c*) The question is, whether A was ravished.

The fact that, shortly after the alleged rape, she made a complaint relating to the crime, and the circumstances under which it was made, are deemed to be relevant, but not (it seems) the terms of the complaint itself.[2]

The fact that, without making a complaint, she said that she had been ravished, is not deemed to be relevant as conduct under this article, though it might be deemed to be relevant (*e. g.*) as a dying declaration under article 26.

ARTICLE 9.

FACTS NECESSARY TO EXPLAIN OR INTRODUCE RELEVANT FACTS.

Facts necessary to be known to explain or introduce a fact in issue or relevant or deemed to be relevant to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue, or is or is deemed to be relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed

[1] *Wright v. Doe d. Tatham*, 7 A. and E., 324–5 (per Denman, C. J.)

[2] *R. v. Walker*, 2 M. and R., 212. See Note V.

to be relevant in so far as they are necessary for those purposes respectively. [A]

Illustrations.

(*a*) The question is, whether a writing published by A of B is libelous or not.

The position and relations of the parties at the time when the libel was published may be deemed to be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are not deemed to be relevant under this article, though the fact that there was a dispute may be deemed to be relevant if it affected the relations between A and B.[1]

(*b*) The question is, whether A wrote an anonymous letter, threatening B, and requiring B to meet the writer at a certain time and place to satisfy his demands.

The fact that A met B at that time and place is deemed to be relevant, as conduct subsequent to and affected by a fact in issue.

The fact that A had a reason, unconnected with the letter, for being at that time at that place, is deemed to be relevant, as rebutting the inference suggested by his presence.[2]

(*c*) A is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are deemed to be relevant, as explanatory of the nature of the transaction.[3]

(*d*) The question is, whether a deed was forged. It purports to be made in the reign of Philip and Mary, and enumerates king Philip's titles.

The fact that at the alleged date of the deed, Acts of State

[1] Common practice.

[2] *R. v. Barnard*, 19 St. Tri., 815, etc.

[3] *R. v. Lord George Gordon*, 21 St. Tri., 520.

[A] *Steam Nav. Co. v. Dandridge*, 8 G. and J., 248, 315; 29 Am. D., 543, 551; *Bank v. Kennedy*, 17 Wall., 19, 24; *Dietsch v. Wiggins*, 15 Wall., 540, 546; *People v. Vernon*, 35 Cal., 49; 95 Am. D., 1, note.

and other records were drawn with a different set of titles, is deemed to be relevant.[1]

(*e*) The question is, whether A poisoned B. Habits of B known to A, which would afford A an opportunity to administer the poison, are deemed to be relevant facts.[2]

(*f*) The question is, whether A made a will under undue influence. His way of life and relations with the persons said to have influenced him unduly, are deemed to be relevant facts.[3]

[(*g*) The question is, whether a dead body buried at a camp in Kansas on March 18th, 1879, is that of H or that of W. The last letter received from W by his family dated early in March, 1879, in which he stated he was about starting with H for Southern Kansas in search of a site for a cattle ranch, were admitted as showing W's intention to be in H's company during March, 1879, and therefore tending to show that the body in question might have been his.] [A]

[1] *Lady Ivy's Case*, 10 St. Tri., 615.

[2] *R. v. Donellan*, Wills Circ. Ev., 192, and see Stephen's History of the Criminal Law, iii., 371.

[3] *Boyse v. Rossborough*, 6 H. L. C., 42–58.

[A] *Mutual Life Insurance Co. v. Hillmon*, 145 U. S., 285, 294; conf. *Com. v. Treefethen*, 157 Mass., 180.

CHAPTER III.

OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 10.*

SIMILAR BUT UNCONNECTED FACTS.

A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith in any of the ways specified in articles 3–10, both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter. [A]

Illustrations.

(*a*) The question is, whether A committed a crime.

The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is irrelevant.[1]

*See Note VI.

[1] *R. v. Cole*, 1 Phi. Ev., 508 (said to have been decided by all the judges in Mich. Term, 1810).

[A] *Mailler v. Propeller Co.* 61 N. Y., 312; *Cole v. Com.*, 5 Grat., 606; *State v. Lapage*, 57 N. H., 245; 24 Am. R., 69; *Gahagan v. Boston, etc., R. R.*, 1 Allen, 187; 79 Am. D., 724.

(*b*) The question is, whether A, a brewer, sold good beer to B, a publican. The fact that A sold good beer to C, D and E, other publicans, is irrelevant[1] (unless it is shown that the beer sold to all is of the same brewing).[2]

ARTICLE 11.*

ACTS SHOWING INTENTION, GOOD FAITH, ETC.

When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is, or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely, on the occasion in question, to act in a similar manner. [A]

Illustrations.

(*a*) A is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C.

The facts that A received from B many other articles stolen by him from C in the course of several months, and that A

* See Note VI.

[1] *Holcombe v. Hewson*, 2 Camp., 391.

[2] See illustrations to article 3.

[A] *Bottomly v. U. S.*, 1 Story R., 135, 143; *Castle v. Bullard*, 23 How., 172, 186; *Lincoln v. Claflin*, 7 Wall., 132, 138; *Butler v. Watkins*, 13 Wall., 457, 464; *Casker v. Enright*, 64 Vt., 488; 33 Am. St. R., 938. See *Kennon v. Gilmer*, 131 U. S., 22, 25.

pledged all of them, are deemed to be relevant to the fact that A knew that the two pieces of silk were stolen by B from C.[1]

(*b*) A is charged with uttering, on the 12th December, 1854, a counterfeit crown piece, knowing it to be counterfeit.

The facts that A uttered another counterfeit crown piece on the 11th December, 1854, and a counterfeit shilling on the 4th January, 1855, are deemed to be relevant to show A's knowledge that the crown piece uttered on the 12th was counterfeit.[2]

(*c*) A is charged with attempting to obtain money by false pretenses, by trying to pledge to B a worthless ring as a diamond ring.

The facts that two days before A tried, on two separate occasions, to obtain money from C and D respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E by pledging as a gold chain a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring.[3]

(*d*) A is charged with obtaining money from B by falsely pretending that Z had authorized him to do so.

The fact that on a different occasion A obtained money from C by a similar false pretense, is deemed to be irrelevant,[4] as A's knowledge that he had no authority from Z on the second occasion had no connection with his knowledge that he had no authority from Z on the first occasion.

(*e*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z,

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[1] *Dunn's Case*, 1 Moo. C. C., 146.

[2] *R. v. Forster*, Dear., 456; and see *R. v. Weeks*, L. & C. 18.

[3] *R. v. Francis* L. R., 2 C. C. R., 128. The case of *R. v. Cooper*, L. R., 1 Q. B. D., (C. C. R.), 19, is similar to *R. v. Francis*, and perhaps stronger.

[4] *R. v. Holt*, Bell C. C. 280. And see *R. v. Francis*, *ub sup.*, p. 130.

and that they had made complaints to B, are deemed to be relevant.[1]

(*f*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is deemed to be relevant, as showing that A knew that the payee was a fictitious person.[2]

(*g*) A sues B for a malicious libel. Defamatory statements made by B regarding A, for ten years before those in respect of which the action is brought are deemed to be relevant to show malice.[3]

(*h*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was, to A's knowledge, supposed to be solvent by his neighbors and by persons dealing with him, is deemed to be relevant, as showing that A made the representation in good faith.[4]

(*i*) A is sued by B for the price of work done by B, by the order of C, a contractor, upon a house, of which A is owner.

A's defense is that B's contract was with C.

The fact that A paid C for the work in question is deemed to be relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.[5]

(*j*) A is accused of stealing property which he had found, and the question is, whether he meant to steal it when he took possession of it.

The fact that public notice of the loss of the property had

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[1] See cases collected in Roscoe's Nisi Prius, 739.

[2] *Gibson v. Hunter*, 2 H. Bl., 288.

[3] *Barrett v. Long*, 3 H. L. C., 395, 414.

[4] *Sheen v. Bumpstead*, 2 H. and C., 193.

[5] *Gerish v. Chartier*, 1 C. B., 13.

been given in the place where A was, and in such a manner that A knew or probably might have known of it, is deemed to be relevant, as showing that A did not, when he took possession of it, in good faith believe that the real owner of the property could not be found.[1]

(*k*) The question is, whether A is entitled to damages from B, the seducer of A's wife.

The fact that A's wife wrote affectionate letters to A before the adultery was committed, is deemed to be relevant, as showing the terms on which they lived and the damage which A sustained.[2]

(*l*) The question is, whether A's death was caused by poison.

Statements made by A before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts.[3]

(*m*) The question is, what was the state of A's health at the time when an insurance on her life was effected by B.

Statements made by A as to the state of her health at or near the time in question are deemed to be relevant facts.[4]

(*n*) The question is, whether A, the captain of a ship, knew that a port was blockaded.

The fact that the blockade was notified in the Gazette is deemed to be relevant.[5]

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[1] This illustration is adapted from *Preston's Case*, 2 Den. C. C., 353; but the misdirection given in that case is set right. As to the relevancy of the fact, see in particular Lord Campbell's remark on p. 359.

[2] *Trelawney v. Coleman*, 1 B. and A., 90.

[3] *R. v. Palmer*. See my "Gen. View of Crim. Law," p. 363, 377 (evidence of Dr. Savage and Mr. Stephens).

[4] *Aveson v. Lord Kinnaird*, 6 Ea., 188.

[5] *Harratt v. Wise*, 9 B. and C., 712.

ARTICLE 12.*

FACTS SHOWING SYSTEM, [NEGLIGENCE, ETC.]

When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned is deemed to be relevant. [A]

[When there is a question whether an accident shown to have happened was caused by the negligence of a defendant, the fact that other accidents of a similar character had previously happened at the same place is deemed to be relevant.] [B]

Illustrations.

(*a*) A is accused of setting fire to his house in order to obtain money for which it is insured.

The facts that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires A received payment from a different insurance office, are deemed to be relevant as tending to show that the fires were not accidental.[1]

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*See Note VI.

[1] *R. v. Gray*, 4 F. and F., 1102.

[A] *Wood v. U. S.*, 16 Peters, 342, 360; *Bottomly v. U. S.*, 1 Story R., 135, 143; *Faucett v. Nichols*, 64 N. Y., 383; *Friend v. Hamill*, 34 Md., 298, 306; *Com. v. Eastman*, 1 Cush., 189; 48 Am. D., 595; *McCasker v. Enright* 64 Vt., 488; 33 Am. St. R., 938.

[B] *Dist. Columbia v. Armes*, 107 U. S., 519, 524; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S., 454, 470; *Brewing Co. v. Bauer*, 50 Ohio St., 560; 40 Am. St. R., 686; *Contra, Hudson v. Chicago, etc., R. R. Co.*, 59 Iowa, 581; 44 Am. R., 692, but see note, p. 694.

(*b*) A is employed to pay the wages of B's laborers, and it is A's duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular occasion he paid more than he really did pay.

The question is whether this false entry was accidental or intentional.

The fact that for a period of two years A made other similar false entries in the same book, the false entry being in each case in favor of A, is deemed to be relevant.[1]

(*c*) The question is, whether the administration of poison to A, by Z, his wife, in September, 1848, was accidental or intentional.

The facts that B, C and D (A's three sons), had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z, are deemed to be relevant, though Z was indicted separately for murdering A, B and C, and attempting to murder D.[2]

(*d*) A promises to lend money to B on the security of a policy of insurance, which B agrees to effect in an insurance company of his choosing. B pays the first premium to the company, but A refuses to lend the money except upon terms which he intends B to reject, and which B rejects accordingly.

The fact that A and the insurance company have been engaged in similar transactions is deemed to be relevant to the question whether the receipt of the money by the company was fraudulent.[3]

[(*e*) In an action against a municipal corporation to recover damages for injuries to the plaintiff resulting from a fall upon a defective sidewalk, the fact that when it was in that condi-

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[1] *R. v. Richardson*, 2 F. and F., 343.

[2] *R. v. Geering*, 18 L. J. M. C., 215; cf. *R. v. Garner*, 3 F. and F., 681. These cases were discussed in *R. v. Neill* (*or Cream*) tried at the Central Criminal Court in October, 1892, when Hawkins, J. admitted evidence of subsequent administration of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted.

[3] *Blake v. Albion Life Assurance Society*, L. R. 4 C. P. D. 94

tion, other like accidents have occurred at the same place is deemed to be relevant.] [A]

ARTICLE 13.*

EXISTENCE OF COURSE OF BUSINESS WHEN DEEMED TO BE RELEVANT.

When there is a question whether a particular act was done, the existence of any course of office or business, according to which it naturally would have been done, is a relevant fact. [B]

When there is a question whether a particular person held a particular public office, the fact that he acted in that office is deemed to be relevant.[1] [C]

When the question is whether one person acted as agent for another on a particular occasion, the fact that he so acted on other occasions is deemed to be relevant. [D]

Illustrations.

(*a*) The question is, whether a letter was sent on a given day.

The post-mark upon it is deemed to be a relevant fact. [2]

* See Note VII.

[1] Ph. Ev., 449; R. N. P., 46; T. E., s. 139.

[2] *R. v. Canning* 19 S. T., 370.

[A] *Dist. of Columbia v. Armes*, 107 U. S., 519, 524.

[B] *Bussard v. Levering*, 6 Wheat., 102; *Lindenburger v. Bell, Ib.*, 104; *U. S. v. Babcock*, 3 Dillon C. C., 571; *1st Nat. Bk. v. McManigle*, 69 Pa. St., 156; 8 Am. R., 236; *Hedden v. Roberts*, 134 Mass., 38, 45; Am. R., 276.

[C] *Bank U. S. v. Dandridge*, 12 Wheat., 64, 70; *McCoy v. Curtice*, 9 Wend., 17; 24 Am. D., 113.

[D] *Putnam v. Home Ins. Co.*, 123 Mass., 324; 25 Am. R., 93; *Austrian & Co. v. Springer*, 94 Mich., 343; 34 Am. St. R., 350.

(*b*) The question is, whether a particular letter was dispatched.

The facts that all letters put in a certain place were, in the common course of business, carried to the post, and that that particular letter was put in that place, are deemed to be relevant.[1] [A]

(*c*) The question is, whether a particular letter reached A.

The facts that it was posted in due course, properly addressed, and was not returned through the dead letter office, are deemed to be relevant.[2] [B]

(*d*) The facts stated in illustration (*d*) to the last article are deemed to be relevant to the question whether A was agent to the company.

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[1] *Hetherington v. Kemp*, 4 Camp., 193, and see *Skilbeck v. Garbett*, 7 Q. B., 846.

[2] *Warren v. Warren*, 1 C. M. and R., 250; *Woodcock v. Houldsworth*, 16 M. and W., 124. Many cases on this subject are collected in Roscoe's *Nisi Prius*, pp. 374–75.

[3] *Blake v. Albion Life Assurance Society*, L. R. 4 C. P. D., 94.

[A] *Howard v. Daly*, 61 N. Y., 362; 19 Am. R., 285.

[B] *Rosenthal v. Walker*, 111 U. S., 185, 93; *Huntley v. Whittier*, 105 Mass., 391; 7 Am. R., 536. The same rule would apply to the question whether a particular telegram reached A. The fact that it was delivered properly addressed at the telegraph office for transmission would be relevant. *Oregon Steamship Co. v. Otis*, 100 N. Y., 446; 53 Am. R., 221. So also a written message received from the office of a long distance telephone, or sent there to be transmitted. As to proof of telephonic communications not committed to writing, see ARTICLE [62 A] post.

CHAPTER IV.

HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 14.*

HEARSAY AND THE CONTENTS OF DOCUMENTS IRRELEVANT.

(*a*) The fact that a statement was made by a person not called as a witness, and,

(*b*) the fact that a statement is contained or recorded in any book, document or record whatever, proof of which is not admissible on other grounds,

are respectively deemed to be irrelevant to the truth of the matter stated, except (as regards (*a*)) in the cases contained in the first section of this chapter,[1]

and except (as regards (*b*)) in the cases contained in the second section of this chapter. [A]

* See Note VIII.

[1] It is important to observe the distinction between the principles which regulate the admissibility of the statements contained in a document and those which regulate the manner in which they must be proved. On this subject see the whole of Part II.

[A] *Mina Queen v. Hepburn*, 7 Cranch, 290, 295; *Hopt v. Utah*, 110 U. S., 574, 581.

Illustrations.

(*a*) A declaration by a deceased attesting witness to a deed that he had forged it, is deemed to be irrelevant to the question of its validity.[1]

(*b*) The question is, whether A was born at a certain time and place. The fact that a public body for a public purpose stated that he was born at that time and place, is deemed to be irrelevant, the circumstances not being such as to bring the case within the provisions of article 34.[2]

SECTION 1.

HEARSAY WHEN RELEVANT.

ARTICLE 15.*

ADMISSIONS DEFINED.

An admission is a statement, oral or written, suggesting any inference as to any fact in issue, or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favor unless it is or is deemed to be relevant for some other reason.

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* See Note IX.

[1] *Stobart v. Dryden*, 1 M. and W., 615.

[2] *Sturla v. Freccia*, L. R. 5, App. Cas. 623.

ARTICLE 16.*

WHO MAY MAKE ADMISSIONS ON BEHALF OF OTHERS, AND WHEN.

Admissions may be made on behalf of the real party to any proceeding—

By any nominal party to that proceeding; [A]

By any person who, though not a party to the proceeding, has a substantial interest in the event; [B]

By any one who is privy in law, [C] in blood [D] or in estate [E] to any party to the proceeding on behalf of that party.

A statement made by a party to a proceeding may be an admission whenever it is made, [F]

*See Note X.

[A] *Turney v. Evans*, 14 N. H., 343; *Beatty v. Davis*, 9 Gill., 211; *Smith v. Palmer*, 6 Cush., 513; *Loomis v. Wadhams*, 8 Gray, 557

[B] *Pike v. Wiggin*, 8 N. H., 356; *Bigelow v. Foss*, 59 Me., 162; *Fickett v. Swift*, 41 Me., 65; 66 Am. D., 214.

[C] *Emerson v. Thompson*, 16 Mass., 429; *McNight v. McNight*, 20 Wis., 446; *Eckert v. Triplett*, 48 Ind., 174; 17 Am. R., 735.

[D] *Tilton v. Emery*, 17 N. H., 536; *Fetherly v. Waggoner*, 11 Wend., 599; *Spalding v. Hallenbeck*, 35 N. Y., 204.

[E] *Royal v. Chandler*, 79 Me., 265; 1 Am. St. R., 305; *Gratz v. Beates*, 45 Pa. St., 495; *Guy v. Hall*, 3 Murph. (N. C.), 150; *Pool v. Morris*, 29 Ga., 374; 74 Am. D., 68.

[F] *Goldsborough v. Baker*, 3 Cranch C. C., 48; *Green v. Gould*, 3 Allen, 465; *Dillon v. Chouteau*, 7 Mo., 386; *Campbell v. Day*, 16 Vt., 588.

unless it is made by a person suing or sued in a representative character only, in which case (it seems) it must be made whilst the person making it sustains that character. [A]

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission unless it is made during the continuance of the interest which entitles him to make it. [B]

Illustrations.

[*a*] The assignee of a bond sues the obligor in the name of the obligee.

An admission on the part of the obligee that the money due has been paid is deemed to be relevant on behalf of the defendant.[1]

(*b*) An admission by the assignee of the bond in the last illustration would also be deemed to be relevant on behalf of the defendant.

(*c*) A statement made by a person before he becomes the assignee of a bankrupt is not deemed to be relevant as an admission by him in a proceeding by him as such assignee.[2]

(*d*) Statements made by a person as to a bill of which he had been the holder are deemed not to be relevant as against the holder, if they are made after he has negotiated the bill.[3]

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[1] See *Moriarty v. L. C. & D. Co.*, L. R., 5 Q. B., 320.

[2] *Fenwick v. Thornton*, M. and M., 51 (by Lord Tenderden). In *Smith v. Morgan*, 2 M. and R., 257, Tindal, C. J., decided exactly the reverse.

[3] *Pocock v. Billing*, 2 Bing., 269.

[A] *Mason v. Poulson, Admr.*, 40 Md., 355, 365; *Beatty v. Davis*, 9 Gill., 211.

[B] *Mandeville v. Welch*, 5 Wheat., 277, 283; *Owings v. Low*, 5 G. and J., 134, 145; *Padgett v. Lawrence*, 10 Paige, 170, 180; 40 Am. D., 232; *Dudley v. Hurst*, 67 Md., 44; 1 Am. St. R., 368.

ARTICLE 17.*

ADMISSIONS BY AGENTS AND PERSONS JOINTLY INTERESTED WITH PARTIES.

Admissions may be made by agents authorized to make them either expressly or by the conduct of their principals; but a statement made by an agent is not an admission merely because if made by the principal himself it would have been one; [to bind the latter it must be made in reference to the business in which the agent is at the time employed and within the scope of his authority.] [A.]

A report made by an agent to a principal is not an admission which can be proved by a third person.[1]

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts. [B]

* See Note XI.

[1] *Re Devala Company* L. R., 22 Ch. Div., 593.

[A] *Cliquot's Champagne*, 3 Wall., 114, 140; *U. S. v. Brig Burdett*, 9 Peters, 682, 689; *Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 U. S., 99, 104; *Stiles v. Western R. R. Co.*, 8 Metc., 44; 41 Am. D., 486, and see 91 Am. D., 463, note.

[B] *Weed v. Kellogg*, 6 McLean, 44; *Fickett v. Swift*, 41 Me., 65; 66 Am. D., 214; *Costelo v. Cave*, 2 Hill, 528; 27 Am. D., 404; 2 Sm. Lea. Ca., *387. According to the weight of American authority, admissions made by a partner after the dissolution of a partnership relating to acts done during its existence are inadmissible against the other partners. *Baker v. Stackpoole*, 9 Cow., 420, 423; 18 Am. D., 508, and other cases cited in note to 2 Whar. Ev., sec. 1196. But a contrary doctrine has been held by some of the courts. *Parker v. Merrill*, 6 Greenl, 41; *Van Reimsdyk v. Kane*, 1 Gall., 631, 635; *Loomis v. Loomis*, 26 Vt., 198, 203, and see 1 Gr. Ev., sec. 112.

[Counsel and attorneys of record] are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in court or in correspondence relating thereto; but statements made by [attorneys or counsel] on other occasions are not admissions merely because they would be admissions if made by the client himself. [A]

The fact that two persons have a common interest in the same subject matter does not entitle them to make admissions respecting it as against each other. [B]

In cases in which actions founded on a contract have been barred by the Statutes of Limitations no joint contractor or his personal representative loses the benefit of such statute, by reason only of any acknowledgment, or promise, or payment of any principal, interest, or other money, by any other or others of them, [made after the statute has run]. [C]

[A] *Treadway v. S. C. & St. P. R. Co.*, 40 Iowa, 526; *Holley v. Young*, 68 Me., 215; 28 Am. R., 40; *McDermot v. Hoffman*, 70 Pa. St., 32, explaining *Truby v. Seybert*, 12 Pa. St., 101; *Wilkins v. Stidger*, 22 Cal., 231; *Saunders v. McCarthy*, 8 Allen, 42.

[B] *Dan v. Brown*, 4 Cowan, 483, 492; 15 Am. D., 395; *Hauberger v. Root*, 6 Watts and S., 431.

[C] *Ellicot v. Nicholls*, 7 Gill., 85, 96; 48 Am. D., 546; *Bell v. Morrison*, 1 Pet., 251, 367. This paragraph is somewhat altered by the omission of several words from as well as the addition of those in brackets to the corresponding one in Stephen, which conforms to the language of British statutes not in force in this country. But see 1 Gr. Ev., sec. 112, n. 3, for conflicting decisions; also note vol. 39 Am. R., p. 417, to *Burgoon v. Bixler*, 55 Md., 384, 392.

A principal, as such, is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives security; [but declarations or admissions of the principal made during the transaction of the business for which the surety is bound are deemed relevant facts as against the latter.] [A]

Illustrations.

(*a*) The question is, whether a parcel, for the loss of which a railway company is sued, was stolen by one of their servants. Statements made by the station-master to a police-officer, suggesting that the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admissions by an agent.[1]

(*b*) A allows his wife to carry on the business of his shop in his absence. A statement by her that he owes money for goods supplied to the shop is deemed to be relevant against him as an admission by an agent.[2]

(*c*) A sends his servant, B, to sell a horse. What B says at the time of the sale, and as part of the contract of sale, is deemed to be a relevant fact as against A, but what B says upon the subject at some different time is not deemed to be

[1] *Kirkstall Brewery v. Furness Ry.*, L. R. 9 Q. B., 468.
[2] *Clifford v. Burton*, 1 Bing., 199.

[A] *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Stetson v. City Bank of N. O.*, 2 Ohio St., 167, 175; *Blair v. Perpetual Ins. Co.*, 10 Mo., 559; 47 Am. D., 129; *Union Savings Co. v. Edwards*, 47 Mo., 445; *Snell v. Allen*, 1 Swan (Tenn.), 208; *Griffith v. Turner*, 4 Gill., 111. As to case of judgment confessed, by principal being deemed a relevant fact as against surety, see *Drummond v. Prestman*, 12 Wheat., 519; *Stovall v. Banks*, 10 Wall., 583, 588; *Iglehart v. State use Mackubin*, 2 G. and J., 235, 245; see also 1 Gr. Ev., sec. 187.

relevant as against A[1] (though it might have been deemed to be relevant if said by A himself.)

(*d*) The question is, whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing statements which would have been admissions if made by the plaintiff himself are deemed to be irrelevant as against him.[2]

(*e*) A, B, and C sue D as partners upon an alleged contract respecting the shipment of bark. An admission by A that the bark was his exclusive property and not the property of the firm is deemed to be relevant as against B and C.[3]

(*f*) A, B, C and D make a joint and several promissory note. Either can make admissions about it as against the rest.[4]

(*g*) The question is whether A accepted a bill of exchange. A notice to produce the bill signed by A's solicitor and describing the bill as having been accepted by A is deemed to be a relevant fact.[5]

(*h*) The question is, whether a debt to A, the plaintiff, was due from B, the defendant, or from C. A statement made by A's solicitor to B's solicitor in common conversation that the debt was due from C is deemed not to be relevant as against A.[6]

(*i*) One co-part-owner of a ship cannot, as such, make admissions against another as to the part of the ship in which they have a common interest, even if he is co-partner with that other as to other parts of the ship.[7]

(*j*) A is surety for B, a clerk. B being dismissed makes statements as to sums of money which he has received and not accounted for. These statements are not deemed to be

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[1] *Helyear v. Hawke*, 5 Esp., 72.
[2] *Langhorn v. Allnut*, 4 Tau., 511.
[3] *Lucas v. De La Cour*, 1 M. & S., 249.
[4] *Whitcomb v. Whitting*, 1 S. L. C., 644.
[5] *Holt v. Squire*, Ry. & Mo., 282.
[6] *Petch v. Lyon*, 9 Q. B., 147.
[7] *Jaggers v. Binning*, 1 Star., 64.

relevant as against A, as admissions,[1] [but such statements of B, if made before his dismissal, are deemed relevant facts as against A. See note [A] on page 32.]

ARTICLE 18.*

ADMISSIONS BY STRANGERS.

Statements by strangers to a proceeding are not relevant as against the parties[2] except in actions against sheriffs for not executing process against debtors, in which statements of the debtor admitting his debt to be due to the execution creditor are deemed to be relevant as against the sheriff.[3] [A]

ARTICLE 19.†

ADMISSION BY PERSON REFERRED TO BY PARTY.

When a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him. [B]

* See Note XII. † See Note XIII.

[1] *Smith v. Whippingam*, 6 C. & P., 78. See also *Evans v. Beattie*, 5 Esp., 26; *Bacon v. Chesney*, 1 Star., 192; *Caermarthen R. C. v. Manchester R. C.*, L. R. 8 C. P., 685.

[2] *Coole v. Braham*, 3 Ex., 183.

[3] *Kempland v. Macaulay*, Peake, 95; *Williams v. Bridges*, 2 Star., 42.

[A] *Hart v. Stevenson*, 25 Conn., 499, 506; 1 Gr. Ev., sec. 181.

[B] *Allen v. Killinger*, 8 Wall., 480; *Turner v. Yates*, 16 How., 14, 28; *Chapman v. Twitchell*, 37 Me., 59; 58 Am. D., 773; *Bedell v. Commercial Ins. Co.*, 3 Bosw. (N. Y.), 147, 154.

Illustration.

The question is, whether A delivered goods to B. B says "if C" (the carman) "will say that he delivered the goods, I will pay for them." C's answer may as against B be an admission.[1]

ARTICLE 20.*

ADMISSIONS MADE WITHOUT PREJUDICE OR UNDER DURESS.

[No offer made by either party by way of compromise or to buy peace is deemed to be a relevant admission in any civil action, if it is made either upon an express condition that evidence of it is not to be given,[2] or under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given;[3] [A] but admissions of any independent facts are deemed to be relevant, though made during a treaty of compromise. [B] Admissions made under duress are not deemed relevant,[4] but in civil actions no legal com-

* See Note XIV.

[1] *Daniel v. Pitt*, 1 Camp., 366, n.; see too *R. v. Mallory*, L. R. 13 Q. B. D., 33. This is a weaker illustration than *Daniel v. Pitt*.

[2] *Cory v. Bretton*, 4 C. & P., 462.

[3] *Paddock v. Forrester*, 5 M. & G., 918.

[4] *Stockfleth v. De Tastet*, per Ellenborough, C. J., 4 Cam., 11.

[A] *Home Ins. Co. v. Balt. Warehouse Co.*, 93 U. S., 527, 548; *Reynolds, Adm., v. Manning*, 15 Md., 510, 526; see also 1 Phil. Ev., 4 American ed., p. 147, note.

[B] *Hartford Bridge Co. v. Granger*, 4 Conn., 142, 148; *Gerrish v. Sweetser*, 4 Pick., 374, 377; *Murray v. Coster*, 4 Cow., 618, 635.

pulsion is held to be such duress as will exclude them.] [A]

ARTICLE 21.

CONFESSIONS DEFINED.

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only. [B] [Confessions are divided into two classes, namely: judicial confessions or those made before the magistrate, or in court, in the due course of legal proceedings, which are themselves sufficient to found a conviction upon, and extra-judicial confessions or those made elsewhere than before a magistrate or in court. These latter, although admissible in evidence, have, in the United States, been held insufficient to found a conviction upon, unless corroborated by other proof of the *corpus delicti*.] [C]

[A] *Tilley v. Dawson*, 11 Cush., 247; *Foss v. Hildreth*, 10 Allen, 76, 80; *Newhall v. Jenkins*, 2 Gray, 562; see 1 Gr. Ev., sec. 193.

[B] *U. S. v. Douglas*, 2 Blatchf., 207; *U. S. v. White*, 5 Cranch C. C., 38; *Gaines v. Rolf*, 12 How., 472, 539; *Hopt v. Utah*, 110 U. S., 574, 583.

[C] *Guild's Case*, 5 Halst., 163, 185; 18Am. D., 404; *Stringfellow v. State*, 26 Miss., 157, 163; 59 Am. D., 247; *Bergen v. People*, 17 Ill., 426; 65 Am. D., 672; *Gray v. Com.*, 101 Pa.; 38 Am. R., 733.

ARTICLE 22.*

CONFESSION CAUSED BY INDUCEMENT, THREAT, OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDING.

No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; [A]

and if (in the opinion of the judge)[1] such inducement, threat, or promise, gave the accused person

* See Note XV.

[1] It is not easy to reconcile the cases on this subject. In *R. v. Baldry*, decided in 1852 (2 Dan., 430), the constable told the prisoner that he need not say anything to criminate himself, but that what he did say would be taken down and used as evidence against him. It was held that this was not an inducement, though there were earlier cases which treated it as such. In *R. v. Jarvis*, L. R., 1 C. C. R., 96, the following was held not to be an inducement: "I think it is right I should tell you that besides being in the presence of my brother and myself" (prisoner's master), "you are in the presence of two officers of the public, and I should advise

[A] *Hopt v. Utah*, 110 U. S., 574, 583; *U. S. v. Pumphreys*, 1 Cranch C. C., 74; *U. S. v. Hunter, Ib.*, 317; *People v. Ward*, 15 Wend., 231; *Com. v. Chabbock*, 1 Mass., 144; *State v. Garvey*, 25 La. Ann., 925; 26 Am. R., 123.

reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. [A]

A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. [B]

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The

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you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue. Take care. We know more than you think we know. So you had better be good boys and tell the truth." On the other hand, in *R. v. Reeve*, L. R., 1 C. C. R., 364, the words "you had better, as good boys, tell the truth." In *R. v. Fennell*, L. R., 7 Q. B. D., 147, "the inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you," was held to exclude the confession which followed. There are later cases (unreported) which follow these.

[A] *U. S. v. Knott*, 1 McLean, 499; *Com. v. Knapp*, 9 Pick., 496; 20 Am. D. 491; *Green v State*, 88 Ga., 516; 30 Am. St. R., 167.

[B] *Com. v. Drake*, 15 Mass., 161; *Com. v. Morey*, 1 Gray, 461; *Com. v. Tuckerman*, 10 Gray, 173; *Aaron v. State*, 37 Ala., 106; *State v. Potter*, 18 Conn., 166.

master of the prisoner is not as such a person in authority if the crime of which the person making the confession is accused was not committed against him. [A]

A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by an inducement, threat, or promise which would otherwise render it involuntary. [B]

Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved. [C]

Illustrations.

(*a*) The question is, whether A murdered B.

A handbill issued by the secretary of state, promising a reward and pardon to any accomplice who would confess, is brought to the knowledge of A, who, under the influence of the hope of pardon, makes a confession. This confession is not voluntary.[1]

[1] *R. v. Boswell*, C. and Marsh, 584.

[A] *Com. v. Howe*, 2 Allen, 153; *Shiffiel's Case*, 14 Gratt, 652; *State v. Revells*, 34 La. Ann., 381; 44 Am. R., 436.

[B] *U. S. v. Kurtz*, 4 Cranch C. C., 166; *Fife v. Com.*, 29 Pa. St., 429; *State v. Carr*, 37 Vt., 191; *Guild's Case*, 5 Halst., 163, 180; 18 Am. D., 404.

[C] *Com. v. Knapp*, 9 Pick., 496; 20 Am. D., 491; *U. S. v.* Hunter, 1 Cranch C. C., 317; *Gates v. People*, 14 Ill., 433; *Duffy v. People*, 26 N. Y., 588; *Belott v. State*, 36 Miss., 96; 72 Am. D., 163.

(*b*) A being charged with the murder of B, the chaplain of the jail reads the Commination Service to A, and exhorts him upon religious grounds to confess his sins. A, in consequence, makes a confession. This confession is voluntary.[1]

(*c*) The jailer promises to allow A, who is accused of a crime, to see his wife, if he will tell where the property is. A does so; This is a voluntary confession.[2]

(*d*) A is accused of child murder. Her mistress holds out an inducement to her to confess, and she makes a confession. This is a voluntary confession, because the mistress is not a person in authority.[3]

(*e*) A is accused of the murder of B. C, a magistrate, tries to induce A to confess by promising to try to get him a pardon if he does so. The secretary of state informs C that no pardon can be granted, and this is communicated to A. After that A makes a statement. This is a voluntary confession.[4]

(*f*) A, accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A had thrown a lantern into a certain pond. The fact that he said so, and that

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[1] *R. v. Gilham*, 1 Moo. C. C., 186. In this case the exhortation was that the accused man should confess "to God," but it seems from part of the case that he was urged also to confess to man "to repair any injury done to the laws of his country." According to the practice at that time, no reasons are given for the judgment. The principle seems to be that a man is not likely to tell a falsehood in such cases, from religious motives. The case is sometimes cited as an authority for the proposition that a clergyman may be compelled to reveal confessions made to him professionally. It has nothing to do with the subject.

[2] *R. v. Lloyd*, 6 C. and P., 393.

[3] *R. v. Moore*, 2 Den. C. C., 522.

[4] *R. v. Clewes*, 4 C. and P., 221.

the lantern was found in the pond in consequence, may be proved.[1]

ARTICLE 23.*

CONFESSIONS MADE UPON OATH, ETC.

Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.[2] [A]

Illustrations.

(*a*) The answers given by a bankrupt in his examination may be used against him in a prosecution for offenses against the law of bankruptcy.[3]

(*b*) A is charged with maliciously wounding B.

Before the magistrates A appeared as a witness for C, who

* See Note XVI.

[1] *R. v. Gould*, 9 C. and P., 364. This is not consistent, so far as the proof of the word goes, with *R. v. Warwickshall*, 1 Leach, 263.

[2] *R. v. Garbett*, 1 Den., 236. See also *R. v. Owen*, 20 Q. B. D., 829, as explained in *R. v. Paul*, 25 Q. B. D., 202.

[3] *R. v. Scott*, 1 D. and B., 47; *R. v. Robinson*, L. R., 1 C. C. R., 80; R. *v. Widdop*, L. R., 2 C. C., 5.

[A] *State v. Gilman*, 51 Me., 209; *Teachout v. People*, 41 N. Y., 7; *Williams v. Com.*, 29 Pa. St., 102; *Hendrickson v. People*, 10 N. Y. (6 Seld.), 13; 61 Am. D., 721; see 1 Gr. Ev., § 225. *State v. Clifford*, 86 Iowa, 553; 41 Am. St. R., 518.

was charged with the same offense. A's deposition may be used against him on his own trial.[1]

ARTICLE 24.

CONFESSION MADE UNDER A PROMISE OF SECRECY.

If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, [A] or in consequence of a deception practiced on the accused person for the purpose of obtaining it, [B] or when he was drunk, [C] or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, [D] or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.[2]

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[1] *R. v. Chidley & Cummins*, 8 C. C. R., 365.

[2] Cases collected and referred to in 1 Ph. Ev., 420, and T. E., s. 804. See, too, Joy, sections iii, iv, v.

[A] *State v. Mitchell*, 1 Phill. (N. C.) L., 447.

[B] *Price v. State*, 18 Ohio St., 418; *Com. v. Hanlon*, 3 Brewster, 461, 498.

[C] *Com. v. Howe*, 9 Gray, 110; *Eskridge v. State*, 25 Ala., 30; *Jefferds v. People*, 5 Parker C. R., 522, 561.

[D] *Carroll v. State*, 23 Ala., 28; 58 Am. D., 282; *Com. v. Mosler*, 4 Pa. St., 264.

ARTICLE 25.

STATEMENTS BY DECEASED [INSANE, OR ABSENT] PERSONS WHEN DEEMED TO BE RELEVANT.

Statements, written or verbal, of facts in issue or relevant or deemed to be relevant to the issue, are deemed to be relevant, if the person who made the statement is dead, in the cases, and on the conditions, specified in articles 26–31, both inclusive. In each of those articles the word "declaration" means such a statement as is herein mentioned, and the word "declarant" means a dead person by whom such a statement was made in his life time.

[Insanity, [A] and, in some cases, permanent absence from the state, has been held to have the same effect as death, in rendering the declarations of such insane or absent person admissible, but upon the admissibility of declarations of absent witnesses, the decisions of the courts of different states are conflicting.] [B]

[A] *Union Bk. v. Knapp*, 3 Pick., 96, 109; 15 Am. D., 181; *Holbrook v. Gay*, 6 Cush., 215, app'd *Reynolds v. Manning*, 15 Md., 510, 523.

[B] In Maryland departure of a person beyond the seas, without having been heard of for ten years, held sufficient ground for admitting statements made by him, in the course of his employment, in evidence: *Reynolds v. Manning*, 15 Md., 510, 523.

In Pennsylvania absence from state equivalent to death, for purpose of admitting declarations of absentee: *Alter v. Berghaus*, 8 Watts, 77; *Sterrett v. Bull*, 1 Binney, 234, 237.

So in South Carolina, *Elms v. Chevis*, 2 McCord, 329.

ARTICLE 26.*

DYING DECLARATION AS TO CAUSE OF DEATH.

A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant

only in trials for the murder or manslaughter of the declarant;

and only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

Such a declaration is not irrelevant merely be cause it was intended to be made as a deposition before a magistrate, but is irregular. [A]

* See Note XVII.

But *contra* in New York, *Brewster v. Doane*, 2 Hill, 537; and also in Alabama, *Moore v. Andrews & Bros.*, 5 Porter, 107.

In Virginia the declarations against his own interest, of one who cannot be compelled to testify, are received as if he were dead: *Harriman v. Brown*, 8 Leigh, 697.

See, also, Am. note to *Price v. Torrington*, 1 Sm. Lea. Cas., 397.

[A] *Commonwealth v. Casey*, 11 Cush., 417; 59 Am. D., 150; *Com. v. Cooper*, 5 Allen, 495; *U. S. v. Veitch*, 1 Cranch C. C., 115. *Clyde Mattox v. U. States*, 146 U. S., 140, 151; *Kilpatrick v. Commonwealth*, 31 Pa. St., 198, 215; *People v. Green*, 1 Park. C. R., 11, and 1 Denio, 614; *Donelly v. State*, 2 Dutcher, 463, 497; *Barfield v. Britt*, 2 Jones L., 41; 62 Am. D., 190.

Illustrations.

(*a*) The question is, whether A has murdered B.

B makes a statement to the effect that A murdered him.

B, at the time of making the statement has no hope of recovery, though his doctor had such hopes, and B lives ten days after making the statement. The statement is deemed to be relevant.[1]

B, at the time of making the statement (which is written down), says something, which is taken down thus: "I make the above statement with the fear of death before me, and with no hope of recovery." B, on the statement being read over, corrects this to "with no hope *at present* of my recovery." B dies thirteen hours afterwards. The statement is deemed to be irrelevant.[2]

(*b*) The question is, whether A administered drugs to a woman with intent to procure abortion. The woman makes a statement which would have been admissible had A been on his trial for murder. The statement is deemed to be irrelevant.[3]

(*c*) The question is, whether A murdered B. A dying declaration by C that he (C) murdered B, is deemed to be irrelevant.[4]

(*d*) The question is, whether A murdered B.

B makes a statement before a magistrate, on oath, and makes her mark to it, and the magistrate signs it, but not in the presence of A, so that her statement was not a deposition within the statute then in force. B, at the time when the statement was made, was in a dying state, and had no hope of recovery. The statement is deemed to be relevant.[5]

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[1] *R. v. Mosley*, 1 Moo., 97.

[2] *R. v. Jenkins*, L. R., 1 C. C. R., 187.

[3] *R. v. Hind*, Bell, 253, following *R. v. Hutchinson*, 2 B. and C., 608, n., quoted in a note to *R. v. Mead*.

[4] *Gray's Case*, Ir. Cir. Rep., 76.

[5] *R. v. Woodcock*, 1 East P. C., 356. In this case, Eyre, C. B., is said to have left to the jury the question, whether the deceased was not in fact under the apprehension of death? 1 Leach, 504. The case was decided in 1789. It is now settled that the question is for the judge.

ARTICLE 27.*

DECLARATIONS MADE IN THE COURSE OF BUSINESS OR PROFESSIONAL DUTY.

A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred,[1] and of his own knowledge.

Such declarations are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty. [A]

Illustrations.

(*a*) The question is, whether A delivered certain beer to B. The fact that a deceased drayman of A's on the evening of the delivery, made an entry to that effect in a book kept for the purpose, in the ordinary course of business, is deemed to be relevant.[2]

(*b*) The question is, what were the contents of a letter not produced after notice.

A copy entered immediately after the letter was written, in a book kept for that purpose, by a deceased clerk, is deemed to be relevant.[3]

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* See Note XVIII.

[1] *Doe v. Turford,* 3 B. and Ad., 898.
[2] *Price v. Torrington,* 1 S. L. C., 328, 7th ed.
[3] *Pritt v. Fairclough,* 3 Camp., 305.

[A] *Welsh v. Barrett,* 15 Mass., 380, 383; *Nicholls v. Webb,* 8 Wheat., 326, 334. See, also, cases cited in Am. note, 1 Sm. Lea. Cas., *394; *Barber v. Bennett,* 58 Vt., 476; 56 Am. R., 565.

(*c*) The question is, whether A was arrested at Paddington, or in South Molton street.

A certificate annexed to the writ by a deceased sheriff's officer, and returned by him to the sheriff, is deemed to be relevant so far as it relates to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place.[1]

(*d*) The course of business was for A, a workman in a coal-pit, to tell B, the foreman, what coals were sold, and for B (who could not write) to get C to make entries in a book accordingly.

The entries (A and B being dead) are deemed to be irrelevant, because B, for whom they were made, did not know them to be true.[2]

(*e*) The question is, what is A's age. A statement by the incumbent in a register of baptisms that he was baptised on a given day is deemed to be relevant. A statement in the same register that he was born on a given day is deemed to be irrelevant, because it was not the incumbent's duty to make it.[3]

(*f*) The question is, whether A was married. Proceedings in a college book, which ought to have been but was not signed by the registrar of the college, were held to be irrelevant.[4]

ARTICLE 28.*

DECLARATIONS AGAINST INTEREST.

A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprie-

* See Note XIX.

[1] *Chambers v. Bernasconi*, 1 C. M. and R., 347. See, too, *Smith v. Blakey*, L. R. 2 Q. B., 326.

[2] *Brain v. Preece*, 11 M. and W., 773.

[3] *R. v. Clapham*, 4 C. and P., 29.

[4] *Fox v. Bearblock*, L. R., 17, Ch. Div. 429.

tary interest.[1] [A] The whole of any such declaration, and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements, not referred to in, or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.[2]

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and (it seems) though there may be no proof other than the statement itself either of such liability or of its discharge in whole or in part.[3]

A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as

[1] These are almost the exact words of Bayley, J., in *Gleadow v. Atkin*, 1 C. and M., 423. The interest must not be too remote. *Smith v. Blakey*, L. R. 29, B. 326.

[2] Illustrations (*a*) (*b*) and (*c*).

[3] Illustrations (*d*) and (*e*).

[A] *White v. Choutteau*, 1 E. D. Smith, 492, 497; *Livingston v. Arnoux*, 56 N. Y., 507, 509; *Peace v. Jenkins*, 10 Ired. (N. C.) L., 355; *Taylor v. Gould*, 57 Pa. St., 152, 156, Am. note to *Higham v. Ridgeway*, 2 Sm. Lea. Cas., *345; *Mulholland v. Ellitson*, 1 Coldw., 307; 78 Am. D., 495. and note.

against those who claim under him, and not as against the reversioner.[1]

An endorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation, [unless it be satisfactorily shown that it was thus made before the statutory period had elapsed, in which case it] is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned [A]; but it is uncertain whether the date of such endorsement or memorandum may be presumed to be correct without independent evidence.[2]

Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.[3] [B]

[1] Illustration (*g*). See Lord Campbell's judgment in case quoted, p. 177.

[2] See the question discussed in 1 Ph. Ev., 302–5, and T. E., secs. 625–9; [also in 1 Gr. Ev., secs. 121–122, and 2 Whar. Ev., sec. 1135] and see Article 85. [3] Illustration (*h*).

[A] *Adams v. Seitzinger*, 1 Watts and S., 243; *Cremer's Est.*, 5 Watts and S., 331; *Allegheny Co. v. Nelson*, 25 Pa. St., 332, 334; *Roseboom v. Billington*, 17 Johns., 182. This paragraph is altered from Stephen by consolidating two paragraphs, portions of each being omitted, and inserting the words in brackets. The alteration was made because he follows the language of English statutes not in force in the United States.

[B] *W. Md. R. Co. v. Manro*, 32 Md., 280, 283.

Illustrations.

(*a*) The question is, whether a person was born on a particular day.

An entry in the book of a deceased man-midwife in these words is deemed to be relevant:[1]

"W. Fowden, Junr.'s wife,
Filius circa hor. 3 post merid. natus H.
W. Fowden, Junr.,
Ap. 22, filius natus,
Wife, £1 6s. 1d.
Pd. 25 Oct., 1768."

(*b*) The question is, whether a certain custom exists in a part of a parish.

The following entries in the parish books, signed by deceased churchwardens, are deemed to be relevant—

"It is our ancient custom thus to proportion church-lay. The chapelry of Haworth pay one-fifth, etc."

Followed by—

"Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly—£8, and £1 for costs."[2]

(*c*) The question is, whether a gate on certain land, the property of which is in dispute, was repaired by A.

An account by a deceased steward, in which he charges A with the expense of repairing the gate is deemed to be irrelevant, though it would have been deemed to be relevant if it had appeared that A admitted the charge.[3]

(*d*) The question is, whether A received rent for certain land.

A deceased steward's account, charging himself with the receipt of such rent for A, is deemed to be relevant, although the balance of the whole account is in favor of the steward.[4]

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[1] *Higham v. Ridgeway*, 2 Smith, L. C., 318, 7th ed.

[2] *Stead v. Heaton*, 4 T. R., 669.

[3] *Doe v. Beviss*, 7 C. B., 456.

[4] *Williams v. Graves*, 8 C. and P., 592.

(*e*) The question is, whether certain repairs were done at A's expense.

A bill for doing them, receipted by a deceased carpenter, is deemed to be { relevant[1] / irrelevant[2] } there being no other evidence either that the repairs were done or that the money was paid.

(*f*) The question is, whether A (deceased) gained a settlement in the parish of B by renting a tenement.

A statement made by A, whilst in possession of a house, that he had paid rent for it, is deemed to be relevant, because it reduces the interest which would otherwise be inferred from the fact of A's possession.[3]

(*g*) The question is, whether there is a right of common over a certain field.

A statement by A, a deceased tenant for a term of the land in question, that he had no such right, is deemed to be relevant as against his successors in the term, but not as against the owner of the field.[4]

(*h*) The question is, whether A was lawfully married to B.

A statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution, is not deemed to be relevant as a statement against interest.[5]

ARTICLE 29.

DECLARATIONS BY TESTATORS AS TO CONTENTS OF WILL.

When there is a question as to the contents of a lost will, the declarations of the deceased testator as to its contents are deemed to be relevant

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[1] *R. v. Heyford*, note to *Higham v. Ridgeway*, 2 S. L. R., 353, 7th ed.

[2] *Doe v. Vowles*, 1 Mo. and Ro., 261. In *Taylor v. Witham*, L. R., 3 Ch. Div., 605, Jessel, M. R., followed *R. v. Heyford*, and dissented from *Doe v. Vowles*.

[3] *R. v. Exeter*, L. R., 4 Q. B., 341.

[4] *Papendick v. Bridgewater*, 5 E. and B., 166.

[5] *Sussex Peerage Case*, 11 C. and F., 108.

When his will has been lost, and when there is a question as to what were its contents; and

When the question is whether an existing will is genuine or was improperly obtained, and

When the question is whether any and which of more existing documents than one constitute his will.

In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.[1] [A]

ARTICLE 30.*

DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.

Declarations are deemed to be relevant (subject to the third condition mentioned in the next article)

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* See Note XX. Also see *Weeks v. Sparke*, 1 M. and S., 679; *Crease v. Barrett*, 1 C. M. and R., 917. Article 5 has much in common with this article. Lord Blackburn's judgment in *Neill v. Duke of Devonshire*, L. R. 8. App. Ca., pp. 186–7, especially explains the law.

[1] *Sugden v. St. Leonards*, L. R., 1 P. D. (C. A.), 154; and see *Gould v. Lake*, L. R. 6 P. D., 1. In questions between the heir and the legatee or devisee such statements would probably be relevant as admissions by a privy in law, estate or blood. *Gould v. Lake*, L. R., 6 P. D., 1; *Doe v. Palmer*, 16 Q. B., 747. The decisions in this case, at p. 757, followed by *Quick v. Quick*, 3 Sw. and Tr., 442, is overruled by *Sugden v. St. Leonards*.

[A] *Matter of Page*, 118 Ills., 576; 59 Am. R., 395; *Foster's Appeal*, 87 Pa. St., 67; 30 Am. R., 322; *Pickens v. Davis*, 134 Mass.; 45 Am. R., 322.

when they relate to the existence of any public or general right or custom or matter of public or general interest. But declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred, are deemed to be irrelevant.

A right is public if it is common to all [citizens of the state], and declarations as to public rights are relevant whoever made them.

A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.

Declarations as to general rights are deemed to be relevant only when they were made by persons who are shown, to the satisfaction of the judge, or who appear from the circumstances of their statement, to have had competent means of knowledge.

Such declarations may be made in any form and manner. [A]

Illustrations.

(*a*) The question is, whether a road is public.

A statement by A (deceased) that it is public is deemed to be relevant.[1]

[1] *Crease v. Barrett*, per Parke, B., 1 C. M. and R., 929.

[A] 1 Gr. Ev., sec. 128. See, also, *Ellicott v. Pearl*, 10 Pet., 412, and 1 Whar., sec. 185, *et seq.*

A statement by A (deceased) that he planted a willow (still standing) to show where the boundary of the road had been when he was a boy, is deemed to be irrelevant.[1]

(*b*) The following are instances of the manner in which declarations as to matters of public and general interest may be made: They may be made in

Maps prepared by or by the direction of persons interested in the matter;[2]

Copies of Court Rolls;[3]

Deeds and leases between private persons;[4]

Verdicts, judgments, decrees and orders of courts, and similar bodies[5] if final.[6]

ARTICLE 31.*

DECLARATIONS AS TO PEDIGREE.

A declaration is deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the existence of any relationship between persons, whether living or dead, or to the birth, marriage or death of any person, by which such relationship was constituted, or to the time or place at which any such fact occurred, or to

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*See Note XXI.

[1] *R v. Bliss*, 7 A. and E., 550.

[2] Implied in *Hammond v. Bradstrett*, 10 Ex., 390, and *Pipe v. Fulcher*, 1 E. and E., 111. In each of these cases the map was rejected as not properly qualified.

[3] *Crease v. Barrett*, 1 C. M. and R, 928.

[4] *Plaxton v. Dare*, 10 B. and C., 17.

[5] *Duke of Newcastle v. Broxtowe*, 4 B. and Ad., 273.

[6] *Pim v. Curell*, 6 M. and W., 234, 266.

any fact immediately connected with its occurrence[1] [A]

Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants.[2] They may be made in any form and in any document or upon any thing in which statements as to relationship are commonly made[3] [B]

The conditions above referred to are as follows:

(1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue.[4] [C]

* See Note XXI.

[1] Illustration (*a*).
[2] *Davies v. Lowndes*, 6 M. and G., 527.
[3] Illustration (*c*).
[4] Illustration (*b*).

[A] *Stein v. Bowman*, 13 Peters, 209, 220; *Ellicott v. Pearl*, 10 Peters, 412, 434; *Craufurd v. Blackburn*, 17 Md., 49, 54; 77 Am. D., 323.

[B] *Ellicott v. Piersoll*, 1 Peters, 328, 337; *Clements v. Hunt*, 1 Jones (N. C.) L., 400; *Chirac v. Reinicker*, 2 Peters, 613, 620; *Secrist v. Green*, 3 Wall., 744; *Gaines v. N. Orleans*, 6 Wall, 642, 699.

[C] *Westfield v. Warren*, 8 N. J. L. (3 Halst.), 249; *Hummel v. Brown*, 24 Pa. St., 310; *Contra* Abbott's Tr. Ev., p. 90, citing *N. Brookfield v. Warren*, 16 Gray, 174, and *Primm v. Steward*, 7 Texas, 178.

(2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate; or by the husband or wife of such a person.[1] [A]

(3) They must be made before the question in relation to which they are to be proved has arisen; but they do not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising.[2] [B]

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.

Illustrations.

(*a*) The question is, which of the three sons (Fortunatus, Stephauus and Achaicus) born at a birth is the eldest.

[1] *Shrewsbury Peerage Case*, 7 H. L. C., 26. For Scotch law, see *Lauderdale Peerage Case*, L. R. 10 App. Ca, 692; also *Lovat Peerage Case*, *ib.*, 763. In *re Turner*, *Glenister v. Harding*, a declaration by a deceased reputed father of his daughter's illegitimacy was admitted on grounds not very clear to me: L. R. 29 Ch. Div., 985, and on the authority of two Nisi Prius cases, *Morris v. Davies*, 3 C. and P., 215, and 1 Mo. and Ro., 269. See note to Art. 34.

[2] *Berkeley Peerage Case*, 4 Cam., 401–417; and see *Lovat Peerage*, 10 L. R. App. Ca., 797.

[A] *Jackson v. Browne*, 18 Johns. (N. Y.), 37; *Chapman v. Chapman*, 2 Conn., 347; 7 Am. D., 297; *Stein v. Bowman*, 13 Peters, 209, 220; *Ellicott. v Pearl*, 10 Peters, 412, 434; *Jewell v. Jewell*, 1 How., 219, 231; *Henderson v. Cargill*, 31 Miss., 367, 394.

[B] *Coujolle v. Ferrie*, 26 Barb., 177, 187; *Stein v. Bowman*, 13 Peters, 209, 220; *Ellicott v. Pearl*, 10 Peters, 412, 434; *Craufurd v Blackburn*, 17 Md., 49; 77 Am. R., 323.

The fact that the father said Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor., xvi, 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant.[1]

(*b*) The question is, whether A, sued for the price of horses and pleading infancy, was on a given day an infant or not.

The fact that his father stated in an affidavit in a chancery suit, to which the plaintiff was not a party, that A was born on a certain day, declared to be irrelevant.[2]

(*c*) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

The fact that he was believed in his family to be dead is deemed to be irrelevant, as the question is not one of pedigree.[3]

(*d*) The following are instances of the ways in which statements as to pedigree may be made: By family conduct or correspondence; in books used as family registers; in deeds and wills; in inscriptions on tombstones, or portraits; in pedigrees, so far as they state the relationship of living persons known to the compiler.[4]

ARTICLE 32.*

EVIDENCE GIVEN IN FORMER PROCEEDING WHEN RELEVANT.

Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is

* See Note XXII.

[1] Vin. Abr., *tit.* Evidence, T. b., 91. The report calls the son Achicus.

[2] *Guthrie v. Haines*, L. R., 13 Q. B. D., 818 (1884). In this case all the authorities on this point are fully considered.

[3] *Whittuck v. Walters* 4 C. and P., 375.

[4] In 1 Ph. Ev., 203–15, and T. E., ss. 583–7, these and many other forms of statement of the same sort are mentioned, and see *Davies v Lowndes*, 6 M. and G., 527.

dead,[1] [A] or is [mentally incapable of testifying],[2] [B] or so ill that he will probably never be able to travel,[3] [C] or is kept out of the way by the adverse party,[4] [D] or in civil, but not, it seems, in criminal cases, is out of the jurisdiction of the court,[5] [E] or, perhaps, in civil, but not in criminal cases when he cannot be found.[6] [F]

Provided in all cases:

(1) That the person against whom the evidence is to be given had the right and opportunity to

[1] *Mayor of Doncaster v. Day*, 3 Tau., 262.
[2] *R. v. Eriswell*, 3 T. R., 720.
[3] *R. v. Hogg*, 6 C. and P., 176.
[4] *R. v. Scaife*, 17 Q. B., 238, 243.
[5] *Fry v. Wood*, 1 Atk., 444; *R. v. Scaife*, 17 Q. B., 243.
[6] Godbolt, p. 236, case 418; *R. v. Scaife*, 17 Q. B., 243.

[A] *U. S. v. McComb*, 5 McLean, 287; *Glass v. Beach*, 5 Verm., 172; *Lightner v. Wike*, 4 S. and R., 203; *Mineral Point R. R. Co. v. Keep*, 22 Ill., 9; 74 Am. D., 124.

[B] "Mentally incapable of testifying" substituted for "mad," in Stephen, in order to include senile imbecility, etc. See *Emig v. Diehl*, 76 Pa. St., 373; *Drayton v. Wells*, 1 Nott and McC., 409; 9 Am. D., 718.

[C] *Miller v. Russell*, 7 Martin, 266, N. S.; *Emig v. Diehl*, 76 Pa. St., 373.

[D] *Drayton v. Wells*, 1 Nott and McC., 409; 9 Am. D., 718; *Williams v. State*, 19 Ga., 402; *Reynolds v. U.S.*, 98 U.S., 145, 158.

[E] *Noble v. McClintock*, 6 Watts and S., 58, 61; *Mims v. Sturtevant*, 36 Ala., 636; *Finn's Case*, 5 Rand, 701; *Brogy v. Commonw.*, 10 Gratt., 722. Authorities conflicting on this point. See note 65 Am. D., 676, to *Bergen v. People*, 17 Ill., 426.

[F] *Wilbur v. Selden*, 6 Cowen, 162; *State v. Staples*, 47 N. H., 113. See note 65 Am. D., 676, *supra*.

cross-examine the declarant when he was examined as a witness.[1] [A]

(2) That the questions in issue were substantially the same in the first as in the second proceeding.[1] [A]

Provided also:

(3) That the proceeding, if civil, was between the same parties or their representatives in interest.[1] [A]

(4) That, in criminal cases, the same person is accused upon the same facts.[2] [B]

If evidence is reduced to the form of a deposition, the provisions of article 90 apply to the proof of the fact that it was given.

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[1] *Doe v. Tatham*, 1 A. and E., 319; *Doe v. Derby*, 1 A. and E., 783, 785, 789. See, as a late illustration as to privies in estate, *Llanover v. Homfray*, 19 Ch. Div., 224. In this case the first set of proceedings was between lords of the same manor and tenants of the same manor as the parties to the second suit.

[2] *Beeston's Case*, Dears., 405.

[A] *Wheeler v. Walker*, 12 Vt., 427; *Jackson v. Bailey*, 2 Johns., 17; *Jackson v. Lawson*, 15 Johns., 544; *Powell v. Waters*, 17 Johns., 176; *Black v. Woodrow*, 39 Md., 194; *Wright v. Cumsty*, 41 Pa. St., 102, 111; *Reynolds v. U. S.*, 98 U. S., 145, 159.

[B] *U. S. v. McComb*, 5 McLean, 287; *Summons v. State*, 5 Ohio St., 325, 340; *Reynolds v. U. S.*, 98 U. S., 145, 159.

SECTION II.

STATEMENTS IN BOOKS, DOCUMENTS AND RECORDS, WHEN RELEVANT.

ARTICLE 33.

RECITALS OF PUBLIC FACTS IN STATUTES AND PROCLAMATIONS.

When any act of state or any fact of a public nature is in issue or is or is deemed to be relevant to the issue, any statement of it made in a recital contained in any public [statute], or in any [public] proclamation or [any message of the Executive to the Legislature], or in any [legislative resolutions], is deemed to be a relevant fact,[1] [and the recital of the acts of any foreign governments and functionaries in state papers published by authority of Congress, and in diplomatic correspondence communicated by the President to Congress, is deemed to be a relevant fact to prove such acts]. [A]

[1] *R. v. Francklin*, 17 S. T., 636; *R. v. Sutton*, 4 M. and S., 532.

[A] Gr. Ev., sec. 491; *Armstrong v. U. S.*, 13 Wall., 154; *Radcliff v. United Ins. Co.*, 7 Johns., 51; *Talbot v. Seeman*, 1 Cranch, 1, 37, 38; *Bryan v. Forsyth*, 19 How., 334, 338; *Watkins v. Holman*, 16 Peters, 25, 55, 56; *Gregg v. Forsyth*, 24 How., 179.

ARTICLE 34.

RELEVANCY OF ENTRY IN PUBLIC RECORD MADE IN PERFORMANCE OF DUTY.

An entry in any record, official book, or register kept in any [state or territory of the Union or the District of Columbia], or at sea, or in any foreign country, stating a fact in issue or relevant or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book or register is kept, is itself deemed to be a relevant fact.[1] [A]

[1] *Sturla v. Freccia*, L. R. 5 App. Ca., 623; see especially p. 633–4 and 643–4. T. E. (from Greenleaf), ss. 1429, 1432. See also *Queen's Proctor v. Fox*, L. R. 4 P. D., 230; *Lyell v. Kennedy*, 14 App. Ca., 437. In *In re Turner, Glenister v. Harding*, L. R. 29 Ch. Div., 990, Chitty, J., in a pedigree case, held, though with some hesitation, and though it was not necessary to the decision of the case, that a statement of age in a baptismal register made under 52 Geo. III., c. 146, might be looked at in a question of legitimacy. His authorities were *Morris v. Davis*, 3 C. and P., 215, and *Cope v. Cope*, 1 Mood. and Rob., 269. These are only Nisi Prius decisions, though spoken of by Chitty as binding on him. See note to Article 31.

[A] 1 Gr. Ev., secs. 483, 484, 485, 493, 494, 495; *Gurney v. Howe*, 9 Gray, 404; 69 Am. D., 229; *Blackburn v. Crawfords*, 3 Wall., 175, 189, 191; *Evanstown v. Gunn*, 99 U. S., 660, 666. As to church records, *Hunt v. Chosen Order of Friends*, 64 Mich., 671; 8 Am. St. R., 855.

ARTICLE 35.

RELEVANCY OF STATEMENTS IN WORKS OF HISTORY [AND SCIENCE], MAPS, CHARTS, AND PLANS.

Statements as to matters of general public history made in accredited historical books [by authors deceased or out of reach of process of the court,] are deemed to be relevant when the occurrence of any such matter is in issue or is or is deemed to be relevant to the issue; but statements in such works as to private rights or customs are deemed to be irrelevant.[1] [A]

[Statements of relevant facts, contained in standard books of exact science or mathematics, such as the Northampton tables of Mortality, Almanacs or the like, may be read in evidence [B], but not statements in works of inductive science, such as medical books, which are not competent evidence for any purpose.] [C]

[1] See cases in 2 Ph. Ev., 155–6 and *Read v. Bishop of Lincoln*, [1892] A. C., 644 at pp. 652–4.

[A] 1 Gr. Ev., sec. 497; *Morris v. Harmer*, 7 Peters, 554; *Charlotte v. Chouteau*, 33 Mo., 194; *Woods v. Banks*, 14 N. H., 101; *Whiton v. Albany City Ins. Co.*, 109 Mass., 24.

[B] *Sauter v. N. Y. Cent. R. R.*, 66 N. Y., 50; 23 Am. R., 15; *Munshower v. State*, 55 Md., 11; 39 Am. R., 414; *Tucker v. Donald*, 60 Miss., 460, 470; 45 Am. R., 416.

[C] *Tucker v. Donald, supra*; *Ashworth v. Kittredge*, 12 Cush., 193; 59 Am. D., 178; note *People v. Wheeler*, 60 Cal., 581; 44 Am. R., 70; *Boyle v. State*, 57 Wis., 472; 46 Am. R., 41.

[*Submitted.*] Statements of facts in issue or relevant or deemed to be relevant to the issue made in published maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts;[1] but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.[2]

ARTICLE 36.

[ENTRIES IN BOOKS OF CORPORATIONS.]

[Entries in the books of a corporation, when the acts recorded are of a public nature and such entries have been made by the proper officer, are deemed to be relevant facts in proving the organization and existence of the corporation and the regularity and legality of the corporate proceedings, and for this

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[1] In *R. v. Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived.

[2] *E. g.*, a line in a title commutation map purporting to denote the boundaries of A's property is irrelevant in a question between A and B as to the position of the boundaries: *Wilberforce v. Hearfield*, L. R. 5 Ch. Div., 709, and see *Hammond v.* ——, 10 Ex , 390.

purpose are admissible in evidence either for or against the corporation, but when such entries relate to the private transactions of the company they are not deemed to be relevant except in actions between the members.] [A]

ARTICLE 37.

[ENTRIES BY PARTY IN HIS OWN BOOKS.]

[In some of the United States entries made by a party in his own books are deemed to be relevant facts in proof of work done and goods delivered by said party when it appears to the court, after inspection thereof, that said books are a register of the daily business of the party, honestly and fairly kept, without alterations or erasures in a material part, save such as are satisfactorily explained, and where the party himself makes oath in open court that they are the books in which the accounts of his ordinary business transactions are usually kept, that the articles therein charged were actually delivered and the labor and services actually performed; that the entries were made at or about the time of the transactions, and are the original entries thereof;

[A] *Owings v. Speed*, 5 Wheat., 420; *Howard v. Hayward*, 5 Metc., 408; *Duke v. Cahawba Nav. Co.*, 10 Ala., 82; 44 Am. D., 472; *McFarlan v. Triton Ins. Co.*, 4 Denio, 392, 399; *Comm. v. Woelpar*, 3 S. and R., 29; 8 Am. D., 628; Angell and Ames on Corp., secs. 679, 681.

and that the sums charged and claimed have not been paid.] [A]

ARTICLE 38.

[ENTRIES MADE IN HIS OWN BOOKS BY A PARTY SINCE DECEASED OR INSANE.]

[In cases where the entries made in his own books by a party, who has since died or become insane, would have been evidence in his own behalf before his death or insanity, such entries are also deemed to be relevant facts in an action brought by his executor, administrator or guardian for work done

[A] 1 Gr. Ev., secs. 118, 119; *Chaffee & Co. v. United States*, 18 Wall., 516, 541. The practice upon this point varies greatly in the different states, and a full statement of the law prevailing in most of them will be found in the American note to *Price v. Earl of Torrington*, 1 Sm. Lea. Cas., p. 552, 7 Am. ed. Previous to the adoption of the statutes rendering parties competent witnesses, their books were held admissible under the circumstances stated in the text in the states of Massachusetts, New Hampshire, Maine, Pennsylvania, South Carolina, Connecticut and Delaware; and also in the states of New York, Illinois, New Jersey, Georgia and Ohio, except that in these latter the suppletory oath of the party himself was neither required nor admitted. In Maryland, North Carolina, Tennessee, Alabama and Vermont, the entries of a party in his own books are not admissible in evidence except where supported by his own oath in open court, and this could not be received (until recently) but for small amounts regulated by statute. In Indiana, Mississippi, Virginia and Kentucky the common law rule prevails. Of course the statutes making parties competent witnesses enable them to use their books to refresh their memory in testifying. See article 136. See 15 Am. D., p. 195, note to *Union Bk v. Knapp*, 3 Pick., 96.

or goods delivered by said deceased or insane party, provided said books comply with the requirements of article 37, and the executor, administrator or guardian makes oath in open court that they came to his hands as the genuine and only books of account of said deceased or insane party; that to the best of his knowledge and belief the entries are original and contemporaneous with the fact, and the debt unpaid; and also furnishes proof that the entries are in the handwriting of said deceased or insane party.] [A]

ARTICLE 39.*

"JUDGMENT."

The word "judgment" in articles 40–47 means any final judgment, order or decree of any court.

The provisions of articles 40–45, both inclusive, are all subject to the provisions of article 46.

ARTICLE 40.

ALL JUDGMENTS CONCLUSIVE PROOF OF THEIR LEGAL EFFECT.

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence

*See Note XXIII.

[A] 1 Gr. Ev., sec. 118; *Kendall, Adm., v. Field et al.*, 14 Maine, 30; *Swearingen v. Harris*, 1 Watts and S., 359. See 15 Am. D., p. 191, note to *Union Bk. v. Knapp*, 3 Pick., 96.

of the state of things so effected is a fact in issue or is or is deemed to be relevant to the issue. The existence of the judgment effecting it may be proved in the manner prescribed in Part II. [A]

Illustrations.

(*a*) The question is, whether A has been damaged by the negligence of his servant B in injuring C's horse.

A judgment in an action, in which C recovered damages against A, is conclusive proof as against B, that C did recover damages against A in that action.[1]

(*b*) The question is, whether A, a shipowner, is entitled to recover as for a loss by capture against B, an underwriter.

A judgment of a competent French prize court condemning the ship and cargo as prize, is conclusive proof that the ship and cargo were lost to A by capture.[2]

(*c*) The question is, whether A can recover damages from B for a malicious prosecution.

The judgment of a court, by which A was acquitted, is conclusive proof that A was acquitted by that court.[3]

(*d*) A, as executor to B, sues C for a debt due from C to B.

The grant of probate to A is conclusive proof as against C, that A is B's executor.[4]

(*e*) A is deprived of his living by the sentence of an ecclesiastical court.

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[1] *Green v. New River Company*, 4 T. R., 590. See article 44, Illustration (*a*).

[2] Involved in *Geyer v. Aquilar*, 7 T. R., 681.

[3] *Leggatt v. Tollervey*, 14 Ex., 301. And see *Caddy v. Barlow*, 1 Man. and Ry., 277.

[4] *Allen v. Dundas*, 37 R., 125–130. In this case the will to which probate had been obtained was forged.

[A] *King v. Chase*, 15 N. H., 9; 41 Am. D., 675; *Key v. Dent*, 14 Md., 86, 98; *Burlen v. Shannon*, 3 Gray, 387, 389; *Ennis v. Smith*, 14 How., 400, 430; *Barr v. Gratz*, 4 Wheat., 213, 220; *Faulcon v. Johnson*, 102 N. C., 264; 11 Am. St. R., 737.

The sentence is conclusive proof of the fact of deprivation in all cases.[1]

(*f*) A and B are divorced *a vinculo matrimonii* by a sentence of the divorce court.

The sentence is conclusive proof of the divorce in all cases.[2]

ARTICLE 41.

JUDGMENTS CONCLUSIVE AS BETWEEN PARTIES AND PRIVIES OF FACTS FORMING GROUND OF JUDGMENT.

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.[3] [A]

Illustrations.

(*a*) The question is, whether C, a pauper, is settled in parish A or parish B.

D is the mother and E the father of C. D, E, and several of their children were removed from A to B before the question as to C's settlement arose, by an order unappealed against, which order described D as the wife of E.

[1] Judgment of Lord Holt in *Philips v. Bury*, 2 T. R., 346, 351.

[2] Assumed in *Needham v. Bremmer*, L. R. 1 C. P., 582.

[3] *R. v. Hutchins*, L. R. 5 Q. B. D., 353, supplies a recent illustration of the principle.

[A] *Beloit v. Morgan*, 7 Wall., 619, 622; *Lawrence v. Vernon*, 3 Sumner, 20; *Case v. Reeve*, 14 Johns, 81; *Embury v. Conner*, 3 N. Y., 511; 53 Am. R., 523. Extrinsic evidence admitted to show what was in fact decided. *Fahey v. Esterley Machine Co.*, 3 No. Dak., 220; 44 Am., St. R., 554 and note. *Burthe v. Denis*, 133 U. S., 514, 523.

The statement in the order that D was the wife of E is conclusive as between A and B.[1]

(*b*) A and B each claim administration to the goods of C, deceased.

Administration is granted to B, the judgment declaring that, as far as appears by the evidence, B has proved himself next of kin.

Afterwards there is a suit between A and B for the distribution of the effects of C. The declaration in the first suit is in the second suit conclusive proof as against A that B is nearer of kin to C than A.[2]

(*c*) A company sues A for unpaid premium and calls. A special case being stated in the court of common pleas, A obtains judgment on the ground that he never was a shareholder.

The company being wound up in the court of chancery, A applies for the repayment of the sum he had paid for premium and calls. The decision that he never was a shareholder is conclusive as between him and the company that he never was a shareholder, and he is, therefore, entitled to recover the sums he paid.[3]

(*d*) A obtains a decree of judicial separation from her husband B, on the ground of cruelty and desertion, proved by her own evidence.

Afterwards B sues A for dissolution of marriage, on the ground of adultery, in which suit neither B nor A can give evidence. A charges B with cruelty and desertion. The decree in the first suit is deemed to be irrelevant in the second.[4]

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[1] *R. v. Hartington Middle Quarter*, 4 E. and B., 780; and see *Flitters v. Allfrey*, L. R. 10 C. P., 29; and contrast *Dover v. Child*, L. R. 1 Ex. Div., 172.

[2] *Barrs v. Jackson*, 1 Phill., 582, 587, 588.

[3] *Bank of Hindustan, etc., Allison's Case*, L. R. 9 Ch. App. 24.

[4] *Stoate v Stoate*, 2 Swa. and Tri., 223. Both would now be competent witnesses in each suit.

ARTICLE 42.

STATEMENTS IN JUDGMENTS IRRELEVANT AS BETWEEN STRANGERS, EXCEPT IN ADMIRALTY AND OTHER CASES IN REM.

Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party or privy, and a stranger, except[1] in the case of judgments of courts of admiralty condemning a ship as prize [and other judgments *in rem* by courts exercising a rightful jurisdiction over the subject matter]. In such cases the judgment is conclusive proof as against all persons of the fact on which it proceeded, where such fact is plainly stated upon the face of the sentence, [A] [but is deemed irrelevant to establish any fact not appearing from the proceedings to have been directly in issue before and expressly decided by the court, even though

[1] This exception is treated by Lord Eldon as an objectionable anomaly in *Lothian v. Henderson*, 3 B. and P., 545. See, too, *Castrique v. Imrie*, L. R. 4 E. and I. App., 434–5.

[A] *Woodruff v. Taylor*, 20 Vt., 65; *Lord v. Chadbourne*,, 42 Me., 429; 66 Am. D , 290; *Rio Grande*, 23 Wall., 458; *Tappan v Beardsley*, 10 Wall., 427, 433; *Ennis v. Smith*, 14 How., 400, 430, 2 Sm. Lea. Cas.; *Doe v. Oliver* and *Duchess Kingston's Case*, Am. note, 7th ed., p. *689.

such fact must have been necessarily assumed by the court in rendering its judgment.] [A]

Illustrations.

(*a*) The question between A and B is, whether certain lands in Kent had been disgaveled. A special verdict on a feigned issue between C and D (strangers to A and B) finding that in the 2d Edw. VI. a disgaveling act was passed in words set out in the verdict is deemed to be irrelevant.[1]

(*b*) The question is, whether A committed bigamy by marrying B during the life time of her former husband C.

A decree in a suit of jactitation of marriage, forbidding C to claim to be the husband of A, on the ground that he was not her husband, is deemed to be irrelevant.[2]

(*c*) The question is, whether A, a shipowner, has broken a warranty to B, an underwriter, that the cargo of the ship whose freight was insured by A was neutral property.

The sentence of a French prize court condemning ship and cargo, on the ground that the cargo was enemy's property, is conclusive proof in favor of B that the cargo was enemy's property (though on the facts the court thought it was not).[3]

[(*d*) A and B are divorced *a vinculo matrimonii* by a sentence of a court having jurisdiction. The sentence is conclusive proof as against all persons, that they are no longer man and wife.

(*e*) Letters of administration granted to A upon B's estate by the proper probate court are inadmissible as evidence of B's death, in an action against a life insurance company upon a policy payable at the death of B; but such letters are conclusive proof against all persons of A's right to administer upon B's estate. [A]

[1] *Doe v Brydges*, 6 M. and G., 282.

[2] *Duchess of Kingston's Case*, 2 S. L. C., 760.

[3] *Geyer v. Aguilar*, 7 T. R., 681.

[A] *Mutual Ins. Co. v. Tisdale*, 91 U. S., 238, 241; *Lea v. Lea*, 99 Mass., 403; 96 Am. D., 772, and note.

(*f*) A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and of good moral character. This certificate is, against all the world, a conclusive judgment of his citizenship and all the rights resulting therefrom, but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant.]

ARTICLE 43.

EFFECT OF JUDGMENT NOT PLEADED AS AN ESTOPPEL.

If a judgment is not pleaded by way of estoppel it is, as between parties and privies, deemed to be a relevant fact, whenever any matter which was or might have been decided in the action in which it was given is in issue, or is or is deemed to be relevant to the issue in any subsequent proceeding.

Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel. [A]

Illustrations.

(*a*) A sues B for deepening the channel of a stream, whereby the flow of water to A's mill was diminished.

[A] *Perkins v. Walker*, 19 Vt., 144. The American decisions are conflicting as to the *conclusiveness* of evidence of a former adjudication given under the general issue where it might have been pleaded as an estoppel, but the weight of authority is in favor of its conclusiveness. See 1 Gr. Ev., secs. 531, 531*a*, and cases there cited also. 2 Sm. Lea. Cas., *Doe v. Oliver*, and *Duchess Kingston's Case*, Am. note, p. *851, 7th Am. ed; *Burt v. Sternburgh*, 4 Cowen, 559; 15 Am. D., 402, and note.

A verdict recovered by B in a previous action for substantially the same cause, and which might have been pleaded as an estoppel, is deemed to be relevant, but not conclusive in B's favor.[1]

(*b*) A sues B for breaking and entering A's land, and building thereon a wall and a cornice. B pleads that the land was his, and obtains a verdict in his favor on that plea.

Afterwards B's devisee sues A's wife (who, on the trial, admitted that she claimed through A) for pulling down the wall and cornice. As the first judgment could not be pleaded as an estoppel (the wife's right not appearing on the pleadings), it is conclusive in B's favor that the land was his.[2]

ARTICLE 44.

JUDGMENTS GENERALLY DEEMED TO BE IRRELEVANT AS BETWEEN STRANGERS.

Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide—

as between strangers;

as between parties and privies in suits where the issue is different even though they relate to the same occurrence or subject matter; [A]

or in favor of strangers against parties or privies.

[1] *Vooght v. Winch*, 2 B. and A., 662; and see *Feversham v. Emerson*, 11 Ex., 391.

[2] *Whitaker v. Jackson*, 2 H. and C., 926. This had previously been doubted. See 2 Ph. Ev., 24, n. 4.

[A] *Arnold v. Arnold*, 17 Pick., 7, 14; *King v. Chase*, 15 N. H., 9; 41 Am. D., 675; *Burlen v. Shannon*, 99 Mass., 200; 96 Am. D., 733; 2 Sm. Lead. Cas., *Doe v. Oliver* and *Duchess Kingston's Case*, Am. note, p. *668, 7th Am. ed., and cases there cited.

But a judgment is deemed to be relevant as between strangers:

(1) if it is an admission, [A] or

(2) if it relates to a matter of public or general interest, so as to be a statement under article 30. [B]

Illustrations.

(*a*) The question is, whether A has sustained loss by the negligence of B his servant, who has injured C's horse.

A judgment recovered by C against A for the injury, though conclusive as against B, as to the fact that C recovered a sum of money from A, is deemed to be irrelevant to the question, whether this was caused by B's negligence.[1]

(*b*) The question whether a bill of exchange is forged arises in an action on the bill. The fact that A was convicted of forging the bill is deemed to be irrelevant.[2] [C]

(*c*) A collision takes place between two ships A and B, each of which is damaged by the other.

The owner of A sues the owner of B, and recovers damages on the ground that the collision was the fault of B's captain. This judgment is not conclusive in an action by the owner of B against the owner of A, for the damage done to B.[3] [*Semble*, it is deemed to be irrelevant.][4]

[1] *Green v. New River Company*, 4 T. R., 589.

[2] Per Blackburn, J., in *Castrique v. Imrie*, L. R., 4 E. and I., App., 434.

[3] *The Calypso*, 1 Swab. Ad., 28.

[4] On the general principle in *Duchess of Kingston's Case*, 2 S. L. C., 813.

[A] *Parsons v. Copland*, 33 Me., 370; 54 Am. D., 628; *Craig v. Carleton*, 8 Shepl., 492; *Kellenberger v. Sturtevant*, 7 Cush., 465.

[B] *Patterson v. Gaines*, 6 How., 550, 599; *Maybee v. Avery*, 18 Johns., 352.

[C] *Summers v. Bergner Brewing Co.*, 143 Pa. St., 114; 24 Am. St. R., 518.

(*d*) A is prosecuted and convicted as a principal felon.

B is afterwards prosecuted as an accessory to the felony committed by A.

The judgment against A is deemed to be irrelevant as against B, though A's guilt must be proved as against B.[1]

(*e*) A sues B, a carrier, for goods delivered by A to B.

A judgment recovered by B against a person to whom he had delivered the goods, is deemed to be relevant as an admission by B that he had them.[2]

(*f*) A sues B for trespass on land.

A judgment, convicting A for a nuisance by obstructing a highway on the place said to have been trespassed on is [at least] deemed to be relevant to the question, whether the place was a public highway [and is possibly conclusive].[3]

ARTICLE 45.

JUDGMENTS CONCLUSIVE IN FAVOR OF JUDGE.

When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction. [A]

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[1] *Semble* from *R. v. Turner*, 1 Moo. C. C., 347.

[2] Buller N. P. 242, b.

[3] *Petrie v. Nuttall*, 11 Ex., 569.

[A] 1 Whar. Ev., sec. 813, but see *ex parte Clapper*, 3 Hill N. Y., p. 438.

Illustrations.

A sues B (a justice of the peace) for taking from him a vessel and 500 lbs. of gunpowder thereon. B produces a conviction before himself of A for having gunpowder in a boat on the Thames (against 2 Geo. III., c. 28).

The conviction is conclusive proof for B, that the thing called a boat was a boat.[1]

ARTICLE 46.

FRAUD, COLLUSION, OR WANT OF JURISDICTION MAY BE PROVED.

Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party against whom it is so offered may prove that the court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party.[2] [A]

[1] *Brittain v. Kinnaird*, 1 B. and B., 432.

[2] Cases collected in T. E., ss. 1524–1525, s. 1530. See, too, 2 Ph. Ev., 35, and *Ochsenbein v. Papelier*, L. R., 8 Ch., 695.

[A] *Elliott v. Piersol*, 1 Pet., 328, 340; *Galpin v. Page*, 18 Wall., 350; *Thompson v. Whitman*, 18 Wall., 457; *Knowles v. Gas Co.*, 19 Wall., 58; *Hill v. Mendenhall*, 21 Wall., 453, as to jurisdiction; *Mandeville v. Welch*, 1 Wheat., 233; *Christmas v. Russell*, 5 Wall., 290, 304; *Hill v. Mendenhall*, 21 Wall., 453; 1 Whar. Ev., sec. 797, as to fraud.

ARTICLE 47.

[JUDGMENTS OF SISTER STATES AND] FOREIGN JUDGMENTS.

The provisions of articles 40–46 apply [to judgments of the courts of sister states of the Union and] to such of the judgments of courts of foreign countries as can by law be enforced in this country, and so far as they can be so enforced.[1] [A]

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[1] The cases on this subject are collected in the note on the *Duchess of Kingston's Case*, 2 S. L. C., 813–845. A list of the cases will be found in R. N. P., 221–3. The last leading cases on the subject are *Godard v. Gray*, L. R., 6 Q. B., 139, and *Castrique v. Imrie*, L. R., 4 E. and I., App., 414. See, too, *Schisby v. Westenholz*, L. R. 6 Q. B., 155, and *Rousillon v. Rousillon*, L. R. 14 Ch. Div., 370; also, *Abouloff v. Oppenheimer*, L. R. 10 Q. B. D., 295.

[A] *Christmas v. Russell*, 5 Wall., 290, 304; *Thompson v. Whitman*, 18 Wall., 457, 460; *Lazier v. Westcott*, 26 N. Y., 146, 150; 82 Am. D., 404; *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. R., 129; 1 Whar. Ev., § 802.

CHAPTER V.*

OPINIONS, WHEN RELEVANT AND WHEN NOT.

ARTICLE 48.

OPINION GENERALLY IRRELEVANT.

[The opinions of witnesses derived from personal observation are admissible in evidence, when, from the nature of the subject under investigation, it cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it, and no better evidence than such opinions can be obtained; [A] but otherwise], the fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter.

Illustrations.

[(*a*) The question is, whether the claimant, in an action of ejectment, is identical with R. T. who, if living, would be

* See Note XXIV.

[A] *Hopt v. Utah*, 120 U. S., 437, 439; *Hardy v. Merrill*, 56 N. H., 227, 241; 22 Am. R., 441; *Dewitt v. Barley*, 17 N. Y., 340; *Sydleman v. Beckwith*, 43 Conn., 9, 11; *Commonwealth v. Sturtevant*, 117 Mass., 122, 133; 19 Am. R., 401; 1 Whar. Ev., secs. 508 to 513; 1 Redf. Wills, secs. 136, 141.

owner of the premises sued for. The opinions of witnesses who were formerly well acquainted with R. T. as to his identity with the claimaint, are relevant. [A]

(*b*) The question is, whether A was drunk at a certain time, the opinion of a witness who saw him at that time is relevant. [B]

(*c*) In an action for breach of promise of marriage, any person who has been in a position to observe the mutual deportment of the parties, may give in evidence his opinion whether or not they were attached to each other. [C]

(*d*) The question is, whether a testator was sane when he made his will. Witnesses who have had opportunities of knowing and observing his conversation, conduct and manners, may depose not only to particular facts, but also to their opinion or belief as to the sanity of said testator, formed from such observation.] [D]

(*e*) The opinions of testator's friends as to his sanity, in illustration (*d*), as expressed by the letters they addressed to him in his life time, are not deemed to be relevant. [E]

[A] *Ticheborne v. Lushington, passim.*

[B] *People v. Eastwood*, 14 N. Y., Ct. App., 562.

[C] *McKee v. Nelson*, 4 Cow., 355; 15 Am. D., 384.

[D] *Insurance Co. v. Rodel*, 95 U. S., 232, 239; *Conn. Life Ins. Co. v. Lathrop*, 111 U. S., 612, 620; *Clary v. Clary*, 2 Ired. R., 78; *Hardy v. Merrill*, 56 N. H., 227; 22 Am. R., 441; *Brooke v. Townsend*, 7 Gill., 27; *Potts v. House*, 6 Ga., 324; 50 Am. D., 329; *Wheeler v. Alderson*, 3 Hagg. Eccl. R., 574, 604, 605; *Tatham v. Wright*, 2 Russ. and Mylne, 1, 19.

[E] *Wright v. Doe d. Tatham*, 7 A. and E., 313; *Waters v. Waters*, 35 Md., 513, 543; *Higgins et al. v. Carlton and Scaggs*, 28 Md., 115, 137; 92 Am. D., 666.

ARTICLE 49.

OPINIONS OF EXPERTS ON POINTS OF SCIENCE OR ART.

When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts. [A]

Such persons are hereinafter called experts.

The words "science or art" include all subjects on which a course of special study or experience is necessary to the formation of an opinion,[1] and amongst others the examination of handwriting. [B]

When there is a question as to a foreign law, [authenticated copies of the written law or] the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary

[1] 1 S. L. C., 555, 7th ed. (note to *Carter v. Boehm*), 28 Vict., c. 18, s. 18.

[A] *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S., 469, 472; *Page v. Parker*, 40 N. H., 47, 58; *Pelamourges v. Clarke*, 9 Iowa, 1, 12; *Hammond v. Woodman*, 41 Me., 177; 66 Am. D., 219, note.

[B] *Withee v. Rowe*, 45 Me , 571, 589; *Davis Appeal*, 38 Md., 15, 37; *Moody v. Rowell*, 17 Pick., 490; 28 Am. D., 317.

explanations from the expert, may construe for itself.[1] [A]

It is the duty of the judge to decide, subject to the opinion of the court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.[2] [B]

The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.[3] [C]

Illustrations.

(*a*) The question is, whether the death of A was caused by poison.

The opinion of experts as to the symptoms produced by

[1] *Baron de Bode's Case*, 8 Q. B., 250–267; *Di Sora v. Phillipps*, 10 H. L., 624; *Castrique v. Imrie*, L. R., 4 E. and I. App., 424; see, too, *Picton's Case*, 20 S. T., 510, 511.

[2] *Bristow v. Sequeville*, 6 Ex., 275; *Rowley v. L. & N. W. Railway*, L. R. 8 Ex., 221. *In the Goods of Bonelli*, L. R. 1 P. D., 69; and see *In the Goods of Dost Aly Khan*, L. D. R. Prob. Div. 6.

[3] 1 Ph., 507; T. E., s. 1278.

[A] *Church v. Hubbart*, 2 Cranch, 187, 327; *Ennis v. Smith*, 14 How., 400, 426; *Charlotte v. Chouteau*, 33 Mo., 194, 200; *Barrows v. Downs*, 9 R. I., 447; 11 Am. R., 283; *Kenny v. Clarkson*, 1 Johns., 385; 3 Am. D., 336; *Phillips v. Gregg*, 10 Watts., 158; 36 Am. D., 138; *Gardner v. Lewis*, 7 Gill., 378, 393.

[B] *Montana Ry. Co. v. Warren*, 137 U. S., 348, 353; *Delaware & Chesapeake Steam Towboat Co. v. Starrs*, 69 Pa. St., 41; *Com. v. Sturtevant*, 117 Mass.; 19 Am. R., 401.

[C] *Walker v. Rogers, Exr.*, 24 Md., 232, 242; *Spear v. Richardson*, 37 N. H., 23, 34; *Dexter v. Hall*, 15 Wall., 9, 26; *Quinn v. Higgins*, 63 Wis., 664; 53 Am. R., 305 and note.

the poison by which A is supposed to have died, are deemed to be relevant.[1]

(*b*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are deemed to be relevant.[2]

(*c*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are deemed to be relevant.[3]

(*d*) The opinions of experts on the questions, whether in illustration (*a*) A's death was in fact attended by certain symptoms; whether in illustration (*b*) the symptoms from which they infer that A was of unsound mind existed; whether in illustration (*c*) either or both of the documents were written by A, are deemed to be irrelevant.

ARTICLE 50.

FACTS BEARING UPON OPINIONS OF EXPERTS.

Facts, not otherwise relevant, are deemed to be relevant if they support or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant. [A]

[1] *R. v. Palmer, passim.* See my History of Crim. Law, iii., 389.

[2] *R. v. Dove, passim.* History of Crim. iii., 426.

[3] 28 Vic., c. 18, s. 8 [but see article 52, *post.*]

[A] *City of Ripon v. Bittel,* 30 Wis., 614, 619; *City of Bloomington v. Shrock,* 110 Ill., 219; 51 Am. R., 678.

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is deemed to be relevant.[1]

(*b*) The question is, whether an obstruction to a harbor is caused by a certain bank. An expert gives his opinion that it is not.

The fact that other harbors similarly situated in other respects, but where there were no such banks,[2] began to be obstructed at about the same time, is deemed to be relevant.

ARTICLE 51.

OPINION AS TO HANDWRITING, WHEN DEEMED TO BE RELEVANT.

When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him, is deemed to be a relevant fact.

A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, or when he has received

[1] *R. v. Palmer*, printed trial, p. 124, etc. Hist. Crim. Law, iii., 389. In this case (tried in 1856) evidence was given of the symptoms attending the deaths of Agnes Senet, poisoned by strychnine in 1845, Mrs. Serjeanston Smith, similarly poisoned in 1848, and Mrs. Dove, murdered by the same poison subsequently to the death of Cook, for whose murder Palmer was tried.

[2] *Foulkes v. Chadd*, 3 Doug., 157.

documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.[1] [A]

Illustrations.

The question is, whether a given letter is in the handwriting of A, a merchant in Calcutta.

B is a merchant in London, who has written letters addressed to A, and received in answer letters purporting to be written by him. C is B's clerk, whose duty is was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.[2]

The opinion of C, who saw A write once twenty years ago, is also relevant.[3]

ARTICLE 52.

COMPARISON OF HANDWRITING.

[Where a paper admitted or clearly proved to be genuine is already in evidence for some other pur-

[1] See Illustrations.

[2] *Doe v. Sackermore*, 5 A. and E., 705 (Coleridge, J.); 730 (Patterson, J.); 739-40 (Denman, C. J.).

[3] *R. v. Horne Tooke*, 25 S. T., 71-2.

[A] *Rogers v. Ritter*, 12 Wall., 317, 320; *Keith v. Lathrop*, 10 Cush., 453; *Johnson v. Daverne*, 19 Johns., 134; *Smith v. Walton*, 8 Gill., 77, 81; *Edelin v. Gough*, ib., 89; *Hammond's Case*, 2 Greenleaf, 33; 11 Am. D., 38; but see *Reese v. Reese*, 90 Pa St., 89; 35 Am. R., 634, and *Bruce v. Crews*, 39 Ga., 544; 99 Am. D., 467.

pose in a cause, and another paper, pertinent to the issue and alleged to be in the same handwriting, is offered in evidence, the jury may compare the latter with the former; [A] and where a writing to be proved is of such antiquity that living witnesses cannot be had, and yet is not old enough to prove itself, experts may compare it with other documents admitted to be genuine or proved to have been respected, treated and acted upon as such by all parties, and may give their opinion concerning the genuineness of the writing in question.] [B]

ARTICLE 53.

OPINION AS TO EXISTENCE OF MARRIAGE, WHEN RELEVANT.

When there is a question whether two persons are or are not married, the facts that they cohabited

[A] *Moore v. United States*, 91 U. S., 270; *Ellis v. People*, 21 How. Pr. (N. Y.), 356; *Van Wyck v. McIntosh*, 14 N. Y., 439, 442; *Williams v. Drexel*, 14 Md., 566, 572. Upon the questions as to whether papers not otherwise in the case may be received and proved for the purpose of comparison, and whether, where such comparison is allowable by the jury, the testimony of experts in regard to it is admissible, there is much conflict in the decisions of the courts in the different states, but the weight of American authority appears to be in the negative upon the first point, and in the affirmative on the second. The cases will be found cited in 1 Gr. Ev., sec. 581, and 1 Whar. Ev., sec. 712, *et seq.*, and the question is fully discussed in *Miles v. Loomis*, 75 N. Y., 288; 31 Am. R., 470.

[B] *Strother v. Lucas*, 6 Peters, 763, 767; *Jackson v. Brooks*, 8 Wend., 626, 631; *Clark v. Wyatt*, 15 Ind., 271; 77 Am. D., 90; 1 Gr. Ev., sec. 578.

and were treated by others as man and wife are deemed to be relevant facts, and [are competent evidence] to raise a presumption that they were lawfully married, and that any act necessary to the validity of any form of marriage which may have passed between them was done; but such facts are not sufficient to prove a marriage in a prosecution for bigamy or in proceedings for a divorce, or in a petition for damages against an adulterer.[1] [A]

ARTICLE 54.

GROUNDS OF OPINION, WHEN DEEMED TO BE RELEVANT.

Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

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[1] *Morris v. Miller*, 2 Burr., 2057; *Birt v. Barlow*, 1 Doug., 170; and see *Catherwood v. Caslon*, 13 Mow., 261. Compare *R. v. Mainwaring*, Dear. and B., 132. See, too, *De Thoren v. A. G.*, L. R., 1 App. Cas., 686; *Piers v. Piers*, 2 H. and C., 331. Some of the references in the report of *De Thoren v. A. G.* are incorrect. This article was not expressed strongly enough in the former editions.

[A] *Jewell v. Jewell*, 1 How., 219, 232; *Blackburn v. Crawford*, 3 Wall., 175, 191; *Jones v. Jones*, 48 Md., 391, 397; 30 Am. R., 466; *Badger v. Badger*, 88 N. Y,, 546; 42 Am. R., 263.

CHAPTER VI.*

CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT.

ARTICLE 55.

EVIDENCE OF CHARACTER GENERALLY IRRELEVANT [IN CIVIL CASES.]

The fact that a person is of a particular character is deemed to be irrelevant to any inquiry respecting his conduct [in civil cases, unless the nature of the action puts the general character of the party directly in issue]. [A]

ARTICLE 56.

EVIDENCE OF CHARACTER IN CRIMINAL CASES.

In criminal proceedings, the fact that the person accused has a good character, is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in

* See Note XXV.

[A] *Attorney-General v. Bowman*, 2 Bos. and Pul., 532; *Fowler v. Ætna Ins. Co.*, 6 Cow., 673, 675; 16 Am. D., 460; *Lander v. Seaver*, 32 Vt., 114, 124; 76 Am. D., 156; *Porter v. Seiler*, 23 Pa. St., 424, 430; 62 Am. D., 341; *Simpson v. Westenberger*, 28 Kansas, 756; 42 Am. R., 195, note; *O'Bryan v. O'Bryan*, 13 Mo., 16; 53 Am. D., 128; *Fahey v. Crotty*, 63 Mich., 383; 6 Am. St. R., 305.

issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

In this article the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation, and not of particular acts by which reputation or disposition is shown.[1] [A]

ARTICLE 57.

CHARACTER AS AFFECTING DAMAGES.

In civil cases, the fact that a person's general reputation is bad may, it seems, be given in evidence in reduction of damages; but evidence of rumors that his reputation was bad, and evidence of particular facts showing that his disposition was bad, cannot be given in evidence.[2] [B]

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[1] *R. v. Rowton*, 1 L. and C., 520.

[2] *Scott v Sampson*, L. R. 8 Q. B. D., 491, in which all the older cases are minutely examined in the judgment of Cave, J.

[A] *Commonwealth v. Webster*, 5 Cush., 295, 324; 52 Am. D., 711; *People v. White*, 14 Wend., 111; *State v. Tozier*, 49 Me., 404; *Wesley v. State*, 37 Miss., 327; 75 Am. D., 62; *Miller v. Curtis*, 158 Mass., 127; 35 Am. St. R., 469.

[B] This is the prevailing rule in the United States. See note (*a*), p. 305 to 1st Am. ed., Odgers on Libel and Slander, where cases are collected; also note, p. 233, 5th ed., 1 Am. Lea. Cas. to *Gilman v. Lowell*, 8 Wend., 673; 3 Sutherland on Damages, 681; *Pease v. Shippen*, 80 Pa. St., 513; 21 Am. R., 116; *Stone v. Varney*, 7 Metc., 86; 39 Am. D., 762.

[According to the weight of authority in the United States, a plaintiff may not, with a view to the instigation of damages, give evidence of his own good character before the defendant has put in evidence attacking it.] [A]

[A] *Chubb v. Gsell*, 34 Pa. St., 115, and cases there cited; also *Klumph v. Dunn*, 66 Pa. St., 141; 5 Am., 355, and *McBee v. Fulton*, 47 Md., 403; 28 Am. R., 465. But in some of the states the plaintiff may give evidence in chief of his good character. *Adams v. Lawson*, 17 Gratt., 250; 94 Am. D., 455; *Burton v. March*, 6 Jones L., 409; *Bennett v. Hyde*, 6 Conn. 24; *Campbell v Campbell*, 54 Wis., 97. See, also, note to *Gilman v. Lowell*, 1 Am. Lea. Cas., 5th ed., p. 233, and Odgers on Libel and Slander, Am. ed., p. *298, note (*b*), where cases are collected.

PART II.
ON PROOF.

CHAPTER VII.

FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE.

ARTICLE 58.

OF WHAT FACTS THE COURT TAKES JUDICIAL NOTICE

[Courts take judicial notice of the following facts:

The existence and titles of all the sovereign powers in the civilized world which are recognized by the government of the United States, their respective flags and seals of State; [A]

The law of nations; [B] the general usages and customs of merchants; [C] treaties made by the United States with foreign governments, and the public acts and proclamations of those governments

[A] *U. S. v. Palmer*, 7 Wheat., 610, 634; *Church v. Hubbard*, 2 Cranch, 187, 238; *The Santissima Trinidad*, 7 Wheat., 273, 335; 1 Gr. Ev., sec. 4; *U. S. v. Wagner*, L. R., 2 Chy. App., 585; *Watson v. Walker*, 23 N. H., 471, 496.

[B] *The Scotia*, 14 Wall., 170, 188.

[C] *Brown v. Piper*, 91 U. S., 37, 42; *Barnet v. Brandao*, 6 M. and G., 630.

and their public authorized agents in carrying such treaties into effect; [A]

Foreign admiralty and maritime courts, [B] and notaries public [C] and their respective seals;

The constitution, public statutes, and general laws and customs of the Union, and also of their own particular state or territory; [D] and the courts of the United States take judicial notice of the laws of the several states applicable to causes depending before them; [E]

The accession of the chief executive of the nation, and of their own state or territory; his power and privileges, [F] and the genuineness of his signature; [G] the heads of departments and principal officers of state [H] and the public seals; [I] the election or resignation of a senator of the United

[A] *U. States v. Reynes*, 9 How., 127, 147.

[B] *Croudson v. Leonard*, 4 Cranch, 434; *Rose v. Himely*, 4 Cranch, 292.

[C] *Nicholls v. Webb*, 8 Wheat., 326, 333; *Orr v. Lacey*, 4 McLean, 243.

[D] *Canal Co. v. B. & O. R. R. Co.*, 4 G. and J., 1, 63; *U. S. v. Turner*, 11 How., 663, 668.

[E] *Owings v. Hull*, 9 Pet., 607, 625; *R. R. Co. v. Bank Ashland*, 12 Wall., 226; *Jones v. Hays*, 4 McLean, 521.

[F] *Hizer v. State*, 12 Ind., 330; *Lindsey v. Attorney-General*, 33 Miss., 508; *State v. Williams*, 5 Wis., 308.

[G] *Jones v. Gales, Exr.*, 4 Martin, 635.

[H] *York, etc., R. R. Co. v. Williams*, 17 How., 30, 41; *Brown v. Piper*, 91 U. S., 37, 42; *Bennett v. Tennessee*, Mart. and Yerg., 133.

[I] *Delafield v. Hand*, 3 Johns., 310, 314; *Den v. Vreelandt*, 2 Halst., 553, 555.

States; the appointment of a cabinet or foreign minister; [A] marshals and sheriffs, [B] and the genuineness of their signatures; [C] but not their deputies; [D] courts of general jurisdiction, their judges, [E] their seals, regular terms, rules and maxims in the administration of justice and course of proceeding; [F]

Public proclamations of war and peace, and of days of special public fasts and thanksgiving; stated days of general political elections, the sittings of congress, and also of their own state or territorial legislatures, and their established and usual course of proceeding, the privileges of the members, but not the transactions on the journals; [G]

The territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, [H] and the local political divisions of their own state into counties, cities, townships and the

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[A] *Brown v. Piper*, 91 U. S., 37, 42; *Walden v. Canfield*, 2 Rob. La. R., 466, 469.

[B] *Ingraham v. State*, 27 Ala., 17, 20.

[C] *Woods v. Fitz*, 10 Mart., 196, 1 Whar. Ev., sec. 322.

[D] *State Bank v. Curran*, 10 Ark., 142; *Land v. Patteson*, Minor (Ala.), 14.

[E] *Gilland v. Sellers*, 2 Ohio St., 223, 226.

[F] *Newell v. Newton*, 10 Pick., 470, 472; *Lindsay v. Williams*, 17 Ala., 229, 231; *Tucker v. State*, 11 Md., 322, 329.

[G] *Armstrong v. U. S.*, 13 Wall., 154, 156; *Gardner v. Collector*, 6 Wall., 4; *U. S. v. Reynes*, 9 How., 127, 147; 1 Gr. Ev., sec. 6, and English cases there cited.

[H] *Gilbert v. Moline*, 19 Iowa, 319.

like, [A] and their relative positions, but not their precise boundaries further than described in public statutes; [B]

The general geographical features of their own country, state and judicial district as to the existence and location of its principal mountains, rivers and cities, [C] and also the geographical position and distances of foreign countries and cities in so far as the same may be fairly presumed to be within the general knowledge of most persons of ordinary intelligence and education within the state or district where the court is held, [D] and the courts of the United States especially take judicial notice of the ports and waters of the United States in which the tide ebbs and flows, and of the boundaries of the several states and judicial districts; [E]

All things which must have happened according to the ordinary course of nature; as the ordinary

[A] *Winnipiseogee Lake Co. v. Young*, 40 N. H., 420, 429; *Goodwin v. Appleton*, 22 Me., 453, 459; *State v. Powers*, 25 Conn., 48.

[B] *Vanderwerker v. People*, 5 Wend., 530; *Ham v. Ham*, 39 Me., 263, 266; *State v. Jackson*, 39 Me., 291; *Wright v. Phillips*, 2 Green (Iowa), 191; *Indianapolis R. R. Co. v. Stephen*, 28 Ind., 429.

[C] *Mossman v. Forrest*, 27 Ind., 233, 236; *Winnipiseogee Lake Co. v. Young*, 40 N. H., 420, 429.

[D] *Whitney v. Gauche*, 11 La. An., 432; *Richardson v. Williams*, 2 Porter (Ala.), 239, 243; *Brown v. Piper*, 91 U. S., 37, 42; see *Malver v. Damson*, 31 Ill , App. 572.

[E] *U. S. v. La Vengeance*, 3 Dall., 397; *Peyroux v. Howard*, 7 Pet., 324, 342; *Brown v. Piper*, 91 U. S., 37, 42.

limitation of human life as to age, the course of time and of the heavenly bodies, the mutations of the seasons and their general relations to the maturity of crops; [A]

The ordinary public fasts and festivals; [B] the coincidence of days of the week with days of the month; [C] the meaning of words in the vernacular language; but not of catch-words, technical, local or slang expressions; [D]

Such ordinary abbreviations as by common use may be regarded as universally understood, as abbreviations of Christian names, and the like, [E] but not those which are in any degree doubtful or difficult of interpretation. [F] The legal weights, measures [G] and coins; [H] the character of the general circulating medium, and the public language in reference to it; [I] but not the current

[A] *Patterson v. McCausland*, 3 Bland., 69; *Floyd v. Johnson*, 2 Litt. (Ky.), 109, 113; *Bryan v. Beckley*, 6 Litt. (Ky.), 91, 95; *Bowen v. Reed*, 103 Mass., 46, 48; *Brown v. Piper*, 91 U. S., 37, 42.

[B] *Sasscer v. Farmers' Bk.*, 4 Md., 409, 420.

[C] *Allman v. Owen*, 31 Ala., 167, 171.

[D] *Commonwealth v. Kneeland*, 20 Pick., 206, 216; *Balto. v. State*, 15 Md., 276, 484.

[E] *Brown v. Piper*, 91 U. S., 37, 42; *Stephen v. State*, 11 Geo., 225, 240; *Moseley v. Mastin*, 37 Ala., 216; *Gordon v. Holliday*, 1 Wash. C. C., 285, 289; *Weaver v. McElhenon*, 13 Mo., 89.

[F] *Ellis v. Park*, 8 Texas, 205.

[G] *Hockin v. Cooke*, 4 T. R., 314.

[H] *U. States v. Burns*, 5 McLean, 23, 30; *Daily v. State*, 10 Ind., 536.

[I] *Lampton v. Haggard*, 3 Monr., 149.

value of the notes of a bank at any particular time; [A]

Any matters of public history affecting the whole people, and also public matters affecting the government of the nation, or of their own particular state or district; [B]

And finally all matters which may be considered as within the common experience or knowledge of all men, [C] or which they are directed by any statute to notice.]

ARTICLE 59.

AS TO PROOF OF SUCH FACTS.

No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the

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[A] *Feemster v. Ringo*, 5 Monr., 336; *Modawell v. Holmes*, 40 Ala., 391.

[B] *Bank of Augusta v. Earle*, 13 Peters, 519, 590; *Ohio Life & T. Co. v. DeBolt*, 16 How., 416, 435; *Brown v. Piper*, 91 U. S., 37, 42; *Keyser v. Coe*, 37 Conn., 597; *Lanfear v. Mestier*, 18 La. Ann., 497; 89 Am. D., 657; 1 Whar. Ev., sec. 338.

[C] *Brown v. Piper*, 91 U. S., 37, 42; see also note to *Lanfear v. Mestier*, 89 Am. D., 663.

party calling upon him to take such notice produces any such document or book of reference.[1] [A]

ARTICLE 60.

EVIDENCE NEED NOT BE GIVEN OF FACTS ADMITTED.

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings.[2] Provided that in a trial for felony the prisoner can make no admissions so as to dispense with proof, though a confession may be proved as against him, subject to the rules stated in articles 21–24.[3] [B]

[1] T. E. (from Greenleaf), s. 20. *E. g.*, a judge will refer in case of need to an almanac, or to a printed copy of the statutes, or write to the foreign office, to know whether a state had been recognized.

[2] R. S. C. O. XXXII. The fact that a document is admitted does not make it relevant, and is not equivalent to putting it in evidence, per James, L. J., in *Watson v. Rodwell*, L. R. 11, Ch. Div. 150.

[3] 1 Ph. Ev., 391, n. 6. In *R. v. Thornhill*, 8 C. & P., Lord Abinger acted upon this rule in a trial for perjury.

[A] *Brown v. Piper*, 91 U. S., 37, 42; *Romero v. U. S.*, 1 Wall., 721; *U. S. v. Teschmaker*, 22 How., 392, 405; *Jones v. U. States*, 137 U. S., 202, 216; *In re Duncan*, 139 U. S., 457.

[B] *Turner v. Yates*, 16 How., 14, 23; 1 Gr. Ev., sec. 27.

CHAPTER VIII.

OF ORAL EVIDENCE.

ARTICLE 61.

PROOF OF FACTS BY ORAL EVIDENCE.

All facts may be proved by oral evidence subject to the provisions as to the proof of documents contained in chapters ix, x, xi and xii.

ARTICLE 62.*

ORAL EVIDENCE MUST BE DIRECT.

Oral evidence must in all cases whatever be direct; that is to say—

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

* See Note XXVII.

If it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

ARTICLE 62 A.

[CONVERSATIONS BY TELEPHONE.]

Conversations by telephone when the parties can recognize each others voices are admissible in evidence to the same extent as other conversations.][A]

[A] *People v. Ward*, 3 N. Y. Crim. R., 483, 511; *Murphy v. Jack*, 142 N. Y., 215; 40 Am. S. R., 590. A conversation held through a telephone kept at a person's office is admissible in evidence against him even though his voice is not recognized. *Wolf v. Mo. Pacific Rwy. Co.*, 97 Mo., 473; 10 Am. St. R., 331; *Mo. Pacific Rwy. Co. v. Heidenheimer*, 82 Texas, 195; 27 Am. St. R., 861. Acknowledgment of deed by married woman through telephone held good. *Banning v. Banning*, 80 Cal., 271; 13 Am. St. R., 156. So also a conversation carried on over the telephone through the operators in the presence of the person whose words they repeat is admissible against such persons. *Sullivan v. Kuykendall*, 82 Ky., 483; 56 Am. R., 901; *Oscamp v. Gadsden*, 35 Neb., 7; 37 Am. R., 428.

ARTICLE 62 B.

[ILLUSTRATION OR CONFIRMATION OF ORAL TESTIMONY BY INSPECTION, VIEW OR PHOTOGRAPHS.]

[For the purpose of illustrating or confirming oral testimony as to the identity, appearance, condition or nature of any person or thing described thereby, the party offering such testimony may by leave of the court submit to the inspection and view of the court or jury, the person or thing so described, or may be called upon to do so by his adversary, and his failure to comply with such request may be considered by the court or jury as bearing on his good faith as in any other case of a party declining to produce the best evidence in his power. [A]

Independently of express statutory provisions upon the subject, it is within the discretion of the court to permit and even to compel the production of any person or thing before it for the purpose above stated, [B] and the exercise of this discretion

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[A] Abbott's Trial Brief, XII, p. 70, 71; 1 Thomp. Tr., Chap. xxvii., § 850, etc. *Warlick v. White*, 76 N. C., 179; *State v. Smith*, 54 Iowa, 104; 37 Am. R., 192. *Hart v. State*, 15 Tex. Ct. App., 202; 49 Am. R., 188; *Union Pacific Rwy. Co. v. Botsford*, 141 U. S., 250, 255.

[B] *Mulhado v. Brooklyn etc. R. Co.*, 30 N. Y., 370; *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375; quoted 3 Am. St. R., 554, n.; *Springer v. Chicago*, 135 Ill., 552, 561.

will not be reviewed on appeal except in cases of manifest abuse. [A]

Whether, in a civil action for physical injuries sustained by the plaintiff, he may be compelled to submit to an examination of his person either by experts before the trial or by the jury at the trial, for the purpose of ascertaining the nature and extent of his injuries is a question upon which the decisions are conflicting. While it is permitted in some of the States, [B] it is held in others and in the courts of the United States that a party cannot be subjected to such an examination without his consent. [C]

There is also conflict in the decisions of the courts in different States as to how far the accused in a criminal trial may be compelled to submit to a physical examination without his consent. [D]

[A] *Shepard v. Missouri Pacific Rwy. Co.*, 85 Mo., 629; 55 Am. R., 390, *Hatfield v. St. Paul etc. R. R. Co.*, 33 Minn., 130; 53 Am. R., 14; *Sidekum v. Wabash etc. Ry. Co.*, 93 Mo., 400; 3 Am. St. R., 549; *Alabama Great So. R. R. Co. v. Hill*, 90 Ala., 71; 24 Am. St. R., 764.

[B] *Atchison etc. Ry. Co. v. Thal*, 29 Kan., 466; 44 Am. R., 659; *White v. Milwaukee Cit. Ry. Co.*, 61 Wis., 536; 50 Am. R., 154; *Alabama Gt. So. R. R. Co. v. Hill*, supra.

[C] *Roberts v. Ogdensburg etc. R. R. Co.*, 29 Hun, 154; *Parker v. Enslow*, 102 Ill., 272; *Union Pacific Rwy. Co. v. Botsford*, 141 U. S., 250.

[D] *State v. Ah Chuey*, 14 Nev., 79, 83; 33 Am. R., 530; *State v. Garrett*, 71 N. C., 85; 17 Am. R., 3; *Stokes v. State*, 5 Baxt., 619; 30 Am. R., 72; *Day v. State*, 63 Ga., 667.

It is provided by statute in several of the States that whenever, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation or of the place where any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place which shall be shown by some person appointed by the court for that purpose. [A]

It has been held that under these statutes the granting or refusing a view is a matter purely within the discretion of the trial court, which is not reviewable on appeal except in cases of manifest abuse; [B] but in the absence of such statutes it would be error for the court to order a view against the objection of a party. [C]

[A] See 1 Thompson Trials, § 882, p. 668, where statutes of California, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Rhode Island, So. Carolina, Virginia, West Virginia and Wisconsin are given.

[B] *Board Com. v. Castella*, 7 Ind. App., 309, (33 N. E. Rep. 986); *Clayton v. Chicago etc. R. Co.*, 67 Iowa, 238; *Jenkin v. R. R. Co.*, 110 N. C., 438; *Boardman v. Westchester F. Ins. Co.*, 54 Wis., 364; *Stewart v. Cin. etc. R. R. Co.*, 89 Mich., 315.

[C] *Doud v. Guthrie*, 13 Bradw , 653; *Bostick v. State*, 61 Ga., 635; contra, *Springer v. Chicago*, 135 Ill., 552, 561.

Whenever the appearance presented by any person or thing at any particular time is a fact in issue or relevant to the issue, and the party seeking to prove such appearance cannot conveniently do so by the production of such person or thing in court, photographs of such person or thing proved by the testimony of witnesses to have been taken at a proper time to reproduce such appearance, may be offered in evidence. [A] The same rule is applicable to the introduction of photographs of places, the condition or appearance of which has since changed, or of which a view has not been ordered by the court.] [B]

[A] *Cowley v. People*, 83 N. Y., 464; 38 Am. R., 464; *Udderzook, v. Comw.*, 76 Pa. St., 340; *White Sewing Machine Co. v. Gordon*, 124 Ind., 495; 19 Am. St. R., 109; *Van Houton v. Morse*, 162 Mass., 414, 422; 44 Am. St. R., 373.

[B] *Dyson v. N. Y. etc. Rwy. Co.*, 57 Conn , 9; 14 Am. St. R., 370; *Miller v. Louisville etc. Rwy. Co.*, 128 Ind., 16; 25 Am. St., R., 416; *Kansas City, M. & B. R R. Co. v. Smith*, 90 Ala., 25; 24 Am. St. R., 753.

CHAPTER IX.*

OF DOCUMENTARY EVIDENCE — PRIMARY AND SECONDARY AND ATTESTED DOCUMENTS.

ARTICLE 63.

PROOF OF CONTENTS OF DOCUMENTS.

The contents of documents may be proved either by primary or by secondary evidence.

ARTICLE 64.

PRIMARY EVIDENCE.

Primary evidence means the document itself produced for the inspection of the court, accompanied by the production of an attesting witness in cases in which an attesting witness must be called under the provisions of articles 66 and 67; or an admission of its contents proved to have been made by a person whose admissions are relevant under articles 15–20.[1] [A]

[1] *Slatterie v. Pooley*, 6 M. & W., 664.

[A] 2 Whar. Ev., secs. 1091, 1092; *Smith v. Palmer*, 6 Cush., 513, 520; *Loomis v. Wadhams*, 8 Gray, 557, 592; *Crichton v. Smith*, 34 Md., 42, 47; *Taylor v. Peck*, 21 Gratt., 11, 20.

Where a document is executed in several parts, each part is primary evidence of the document;

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.[1] [A]

Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest;[2] but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.[3] [B]

[1] *Roe d. West v. Davis*, 7 Ea., 362.

[2] *R. v. Watson*, 2 Star., 129. This case was decided long before the invention of photography, but the judgments delivered by the court (Ellenborough, C. J., and Abbott, Bayley and Holroyd, JJ.), establish the principle stated in the text.

[3] *Noden v. Murray*, 3 Camp., 224.

[A] *Carroll v. Peake*, 1 Peters, 18, 22; *Cleveland R. R. v. Perkins*, 17 Mich., 296, 299.

[B] 1 Whar. Ev., sec. 92, 676. Letter press copies of correspondence are secondary evidence. *Foot v. Bentley*, 44 N. Y., 166; 4 Am. R., 652.

[The original paper sent to a telegraph office is primary evidence of the message sent as against the sender, but not of the message received at the place of its delivery. The telegram delivered to the person addressed is primary evidence as against him of the communication he received, only secondary evidence of the message that was sent to him.] [c]

[c] *Smith v. Easton*, 54 Md., 138; *Oregon Steamship Co. v. Otis*, 100 N. Y., 446; 53 Am. R., 221; *Conyers v. Postal Tel. Cable Co.*, 92 Ga., 619; 44 Am. S. R., 100. The primary evidence must be produced or its non-production accounted for before secondary proof may be admitted; ib. *Matteson v. Noyes*, 25 Ill., 591; *Cairo & St. Louis R. R. Co., v. Mahoney*, 82 Ill., 73; 25 Am. R., 299. Secondary proof may be admitted (1) when original has been destroyed by the company. *Smith v. Easton*, and *Oregon Steamship v. Otis*, supra; (2) when original in possession of a third party beyond the jurisdiction of the court. *Barrons v. Brown*, 25 Kan., 414; *Whildin v. Merch. & Pl. Nat. Bk.*, 64 Ala., 30; 38 Am. R., 1; (3) or has been lost and cannot be found. *Lindauer v. Mayberg*, 27 Mo., App. 181. Upon proof of delivery of the message for the purpose of transmission properly addressed to the correspondent, a presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial and raise an issue to be determined. *Oregon Steamship Co. v. Otis*, supra. In the following cases the message received has been held primary evidence of the message sent upon the ground that the sender made the telegraph company his agent. *Saveland v. Green*, 40 Wis., 431; *Morgan v. People*, 59 Ill., 58; *Wilson v. Minneapolis etc. N. W. Co.*, 31 Minn., 483; *Magie v. Herman*, 50 Minn., 424; 36 Am. St. R., 660; *Ayer v. W. U. Tel. Co.*, 79 Me.; *W. U. Tel. Co. v. Shotter*, 71 Ga., 760. But there must be some preliminary proof of the agency of the company sending it. *Culver v. Warren*, 36 Kan., 391.

ARTICLE 65.

PROOF OF DOCUMENTS BY PRIMARY EVIDENCE.

The contents of documents must, except in the cases mentioned in article 71, be proved by primary evidence; and in the cases mentioned in article 66 by calling an attesting witness.

ARTICLE 66.*

PROOF OF EXECUTION OF ATTESTED DOCUMENTS.

If a document is attested, it may not be used as evidence (except in the cases mentioned or referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the court, until one attesting witness at least has been called for the purpose of proving its execution.

If it is shown that no such attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. [A]

The rule extends to cases in which—

the document has been burnt [1] or canceled;[2]

the subscribing witness is blind;[3]

the person by whom the document was executed is prepared to testify to his own execution of it;[4] [B]

*See Note XXVIII.

[1] *Gillies v. Smither*, 2 Star. R., 528.

[2] *Breton v. Cope*, Pea. R., 43.

[3] *Cronk v. Frith*, 9 C. and P., 197.

[4] *R. v. Harringworth*, 4 M. and S., 353.

[A] *Heckhart v. Haine*, 6 Bin., 16; *Citizens Bank v. Steamboat Co.*, 2 Story, 16, 41; 1 Wh. Ev., sec. 723, and cases there cited.

[B] *Story v. Lovett*, 1 E. D. Smith, 153; *Brigham v. Palmer*, 3 Allen, 450; *Contra*, *Forsythe v. Hardin*, 62 Ill., 206.

the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause,[1] unless such admission be made for the purpose of, or has reference to, the cause. [A]

ARTICLE 67.*

CASES IN WHICH ATTESTING WITNESS NEED NOT BE CALLED.

In the following cases, and in the case mentioned in article 88, but in no others, a person seeking to prove the execution of an attested document, is not bound to call for that purpose either the party who executed the deed or any attesting witness, or to prove the handwriting of any such party or attesting witness—

(1) When he is entitled to give secondary evidence of the contents of the document under article 71 (*a*);[2] [B]

(2) When his opponent produces it when called

* See Note XXVIII.

[1] *Call v. Dunning*, 4 Ea., 53. See, too, *Whyman v. Garth*, 8 Ex., 803; *Randall v. Lynch*, 2 Camp., 357.

[2] *Cooper v. Tamswell*, 8 Tau., 450; *Poole v. Warren*, 8 A. and E., 588.

[A] *Fox v. Reil*, 3 Johns., 477; *Henry v. Bishop*, 2 Wend., 575, 576; *Turner v. Green*, 2 Cranch C. C., 202.

[B] *Davis v. Spooner*, 3 Pick., 284.

upon and claims an interest under it in reference to the subject matter of the suit; [1] [A]

(3) When the person against whom the document is sought to be proved is a public officer bound by law to procure its due execution, and who has dealt with it as a document duly executed; [2]

[(4) When it is a document required by law to be registered, and a certified copy would be admissible in evidence; [B]

(5) When the instrument is not directly in issue but comes incidentally in question in the course of the trial; [C]

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[1] *Pearce v. Hooper*, 3 Tau., 60; *Rearden v. Minter*, 5 M. and G., 204. As to the sort of interest necessary to bring a case within this exception, see *Collins v. Bayntun*, 1 Q. B., 118.

[2] *Plumer v. Brisco*, 11 Q. B., 46. *Bailey v. Bidwell*, 13 M. and W., 73, would perhaps justify a slight enlargement of the exception, but the circumstances of the case were very peculiar. Mr. Taylor (ss. 1650-1) considers it doubtful whether the rule extends to instruments executed by corporations, or to deeds enrolled under the provisions of any act of parliament, but his authorities hardly seem to support his view; at all events, as to deeds by corporations.

[A] *Jackson v. Kingsley*, 17 Johns., 158; *Jackson v. Halstead*, 5 Cow., 216, 218; *McGregor v. Wait*, 10 Gray, 72; 69 Am. D., 305.

[B] *Knox v. Silloway*, 1 Fairfield (Me) 201, 216; *Kelsey v. Hanmer*, 18 Conn., 311, 318; *Burghart v. Turner*, 12 Pick., 534, 538; *Scanlon v. Wright*, 13 Pick., 523, 527; 25 Am. D., 344; 1 Gr. Ev., 571, note 3.

[C] *Curtis v. Belknap*, 21 Vt., 433, 436; *Fairfax v. Fairfax*, 2 Cranch C. C., 25; *Ayers v. Hewitt*, 19 Me., 281, 285; 1 Gr. Ev., sec. 573, b (Redf. ed.).

(6) In cases where the common law rule has been modified by statute, as has been done in many of the states.]

ARTICLE 68.

PROOF WHEN ATTESTING WITNESS DENIES THE EXECUTION.

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.[1] [A]

ARTICLE 69.

[PROOF OF ATTESTED DOCUMENT ACKNOWLEDGED UNDER STATUTE.]

[Whenever a statute authorizes the acknowledging of an instrument, providing at the same time that such instrument shall be admissible in evidence on proof of its acknowledgment, then if the conditions required by the statute as prerequisites of the acknowledging appear from the record to have been observed, it is not necessary to call the attesting witnesses, but such instrument may be put in evidence after the acknowledgment required by the

[1] "Where an attesting witness has denied all knowledge of the matter, the case stands as if there were no attesting witness:" *Talbot v. Hodson*, 7 Tau., 251, 254.

[A] *Whitaker v. Salisbury*, 15 Pick., 534, 544; *Hall v. Phelps*, 2 Johns., 451; *Booker v. Bowles*, 2 Blackf., 90.

statutes, either by force of the statutes or at common law, by proving the execution.] [A]

ARTICLE 70.

SECONDARY EVIDENCE OF DOCUMENTS.

Secondary evidence means:

(1) Examined copies, exemplifications, office copies, and certified copies;[1]

(2) Other copies made from the original and proved to be correct;

(3) Counterparts of documents as against the parties who did not execute them;[2]

(4) Oral accounts of the contents of a document given by some person who has himself seen it

ARTICLE 71.

CASES IN WHICH SECONDARY EVIDENCE RELATING TO DOCUMENTS MAY BE GIVEN.

Secondary evidence may be given of the contents of a document in the following cases:

(*a*) When the original is shown or appears to be in the possession or power of the adverse party,

[1] See chapter X.

[2] *Munn v. Godbold*, 3 Bing., 292.

[A] *Houghton v. Jones*, 1 Wall., 702, 706; also 1 Whar. Ev., sec. 740, and cases there cited.

and when, after the notice mentioned in article 72, he does not produce it ;[1] [A]

(*b*) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in court ; [2] [B]

(*c*) When the original has been destroyed or lost, and proper search has been made for it ;[3] [C]

(*d*) When the original is of such a nature as not to be easily movable,[4] [D] or is in [the possession of

[1] *R. v. Watson*, 2 T. R., 201. *Entick v. Carrington*, 19 S. T., 1073, is cited by Mr. Phillips as an authority for this proposition. I do not think it supports it, but it shows the necessity for the rule, as at common law no power existed to compel the production of documents.

[2] *Miles v. Oddy*, 6 C. and P., 732; *Marston v. Downes*, 1 A. and E., 31.

[3] 1 Ph. Ev., s. 452; 2 Ph. Ev., 281; T. E. (from Greenleaf), s. 399. The loss may be proved by an admission of the party or his attorney; *R. v. Haworth*, 4 C. and P., 254.

[4] *Mortimer v. McCallan*, 6 M. and W., 67, 68 (this was the case of a libel written on a wall); *Bruce v. Nicolopulo*, 11 Ex., 133 (the case of a placard posted on a wall).

[A] *Turner v. Yates*, 16 How., 14, 26; *Hanson v. Eustace's Lessee*, 2 How., 653, 708; *Riggs v. Tayloe*, 9 Wheat., 483, 486.

[B] *Brandt v. Klein*, 17 Johns., 335; *Rusk v. Sowerwine*, 3 H. and J., 97; 1 Gr. Ev., sec. 558; 1 Whar. Ev., sec. 150.

[C] *Tayloe v. Riggs*, 1 Peters, 591, 596; *Patterson v. Winn*, 5 Peters, 233, 240, 242; *Riggs v. Tayloe*, 9 Wheat., 483, 486; *Renner v. Bk. Columbia*, 9 Wheat., 581, 596.

[D] *N. Brookfield v. Warren*, 16 Gray. 171, 174.

a person living beyond the jurisdiction of the court ;[1] [A]

(*e*) When the original is a public document;[2]

(*f*) [When the document is required or authorized by law to be registered, and a certified copy from the registry is made evidence by statute;] [B]

(*g*) When the original is a document for the proof of which special provision is made by statute or any law in force for the time being;[3] [C] or

(*h*) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection; provided that that result is capable of being ascertained by calculation.[4] [D]

Subject to the provisions hereinafter contained,

[1] *Alivon v. Furnival*, 1 C. M. and R., 277, 291-2.

[2] See chapter X.

[3] *Ibid.*

[4] *Roberts v. Doxen*, Peake, 116; *Meyer v. Sefton*, 2 Star., 276. The books, etc., should, in such a case be ready to be produced if required: *Johnson v. Kershaw*, 1 De G. and S., 264.

[A] *Burton v. Driggs*, 20 Wall., 125, 134; *Sheppard v. Giddings*, 22 Conn., 282; *Bowman v. Sanborn*, 5 Foster, 87, 112.

[B] *Patterson v. Winn*, 5 Peters, 233, 41; *Smith v. U. S.*, 5 Peters, 292, 299.

[C] *Barney v. Schmeider*, 9 Wall., 248, 253; *Raymond v. Longworth*, 4 McLean, 481, 483.

[D] *Boston & W. R. R. Corp. v. Dana*, 1 Gray, 83, 104; *Burton v. Driggs*, 20 Wall., 125, 136.

any secondary evidence of a document is admissible.[1] [A]

[In cases (*f*) and (*g*) proof must be made by copies duly authenticated by the proper officer, and in the manner prescribed by statute.]

In case (*h*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge,[2] [B] unless, in deciding such a question, the judge would, in effect, decide the matter in issue.

ARTICLE 72.*

RULES AS TO NOTICE TO PRODUCE.

Secondary evidence of the contents of the documents referred to in article 71 (*i*), may not be given

*See Note XXIX.

[1] If a counterpart is known to exist, it is the safest course to produce or account for it: *Munn v. Godbold*, 3 Bing., 297; *R. v. Castleton*, 7 T. R., 236.

[2] *Stowe v. Querner*, L. R. 5 Exch., 155.

[A] *Butler v. Maples*, 9 Wall., 766, 778. The American courts ordinarily require a party giving secondary evidence to produce the best in his power. See *Cornett v. Williams*, 20 Wall., 226, 246; *Keroy v. Thorpe*, 28 Ala., 250; 65 Am. D., 344; see 1 Gr. Ev., sec. 84, note (2); 1 Whar. Ev., sec. 90.

[B] *Tayloe v. Riggs*, 1 Peters, 591, 597; *Minor v. Tillotson*, 7 Peters, 99.

unless the party proposing to give such secondary evidence has,

if the original is in the possession or under the control of the adverse party, given him such notice to produce it as the court regards as reasonably sufficient to enable it to be procured;[1] [A] or has

if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production;[2] [B]

if a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the *subpœna* to give secondary evidence of the contents of the document.[3] [C]

Such notice is not required in order to render secondary evidence admissible in any of the following cases—

(1) When the document to be proved is itself a notice; [D]

[1] *Dwyer v. Collins*, 7 Ex., 648.
[2] *Newton v. Chaplin*, 10 C. B., 56-69.
[3] *R. v. Llanfaethly*, 2 E. and B., 940.

[A] *Turner v. Yates*, 16 How., 14, 26; *Hanson v. Eustace's Lessee*, 2 How., 653; *Morrison v. Whiteside*, 17 Md., 452; 79 Am. D., 661.

[B] *Rusk v. Sowerwine*, 3 H. and J., 97; *Brandt v. Klein*, 17 Johns., 335; 1 Wh. Ev., sec. 150.

[C] *Bull v. Loveland*, 10 Pick., 9, 14; 1 Whar. Ev., sec. 150.

[D] *Eagle Bank v. Chapin*, 3 Pick., 180, 182; *Morrow v. Commonwealth*, 48 Pa. St., 305, 308.

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production;[1] [A]

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it;[2]

(4) When the adverse party or his agent has the original in court.[3] [B]

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[1] *How v. Hall*, 14 Ea., 247. In an action on a bond, no notice to produce the bond is required. See other illustrations in 2 Ph. Ev., 373; T. E., s. 422.

[2] *Leeds v. Cook*, 4 Esp., 256.

[3] Formerly doubted, see 2 Ph. Ev., 278, but so held in *Dwyer v. Collins*, 7 Ex., 639.

[A] *Lawson v. Bachman*, 81 N. Y., 616; *Dana v. Conant*, 30, Vt., 246, 257; *McLean v. Hertzog*, 6 S. and R., 154.

[B] *McPherson v. Rathbone*, 7 Wend., 216, 219; *Rhoads v. Selin*, 4 Wash. C. C., 715, 718.

CHAPTER X.

PROOF OF PUBLIC DOCUMENTS.

ARTICLE 73.

PROOF OF PUBLIC DOCUMENTS.

When a statement made in any public document, register or record, judicial or otherwise, or in any pleading or deposition kept therewith is in issue, or is relevant to the issue in any proceeding, the fact that that statement is contained in that document may be proved in any of the ways mentioned in this chapter.[1]

ARTICLE 74.

PRODUCTION OF DOCUMENT ITSELF.

The contents of any public document whatever may be proved by producing the document itself for inspection from proper custody, and identifying it as being what it professes to be.

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[1] See articles 36 and 90.

ARTICLE 75.*

EXAMINED COPIES.

The contents of any public document whatever may in all cases be proved by an examined copy.

An examined copy is a copy proved by oral evidence to have been examined with the original and to correspond therewith. The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy, and it is not necessary that each should alternately read both.[1] [A]

ARTICLE 76.

[GENERAL RECORDS OF THE NATION.]

[Copies of any books, records, papers or documents in any of the executive departments or public offices of the Federal government, authenticated under the seals of such departments or offices respectively, and certified by the officer at the head of such office for the time being, shall be admitted in evidence equally with the originals thereof.] [B]

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* See Note XXX, also *Doe v. Ross*, 7 M. and W., 106.

[1] 2 Ph. Ev., 200, 231; T. E., ss. 1379, 1389; R. N. P., 113.

[A] *Whitehouse v. Beckford*, 9 Foster, 471, 480; 1 Gr. Ev., secs. 91, 508; 1 Whar. Ev., sec. 94.

[B] Rev. Stat. U. S., secs. 882 to 898 inclusive.

ARTICLE 77.*

EXEMPLIFICATIONS.

An exemplification is a copy of a record set out either under the great seal or under the seal of a court.

A copy made by an officer of the court, bound by law to make it, is equivalent [in courts of the same state] to an exemplification, though it is sometimes called an office copy.

An exemplification is equivalent to the original document exemplified. [A]

ARTICLE 78.*

COPIES EQUIVALENT TO EXEMPLIFICATIONS.

A copy made by an officer of the court, who is authorized to make it by a rule of court, but not required by law to make it, is regarded as equivalent to an exemplification in the same cause and court, but in other causes or courts it is not admissible unless it can be proved as an examined copy. [B]

* See Note XXXI.

[A] 1 Whar. Ev., secs. 107, 104.
[B] 1 Whar. Ev., sec. 104.

ARTICLE 79.

CERTIFIED COPIES.

It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they are respectively authenticated in the manner prescribed by such statutes.[1]

Whenever, by virtue of any such provision, any such certificate or certified copy as aforesaid is receivable in proof of any particular in any court of justice, it is admissible as evidence if it purports to be authenticated in the manner prescribed by law without proof of any stamp, seal or signature required for its authentication or of the official character of the person who appears to have signed it.[2] [A]

[1] 8 and 9 Vic., c. 113, preamble. Many such statutes are specified in T. E., s. 1440, and following sections. See, too, R. N. P., 114–5.

[2] *Ibid.*, s. 1. I believe the above to be the effect of the provision, but the language is greatly condensed. Some

[A] See *ante*, art. 58; 2 Whar. Ev., secs. 1313, 1314; 1 Gr. Ev., sec. 200; *Bullen v. Arnold*, 31 Me., 583; *Ross v. Read*, 1 Wheat., 482.

ARTICLE 80.

[LITTLE & BROWN'S EDITION OF U. S. LAWS.]

[The edition of the laws and treaties of the United States published by Little & Brown, are competent evidence of the several public and private acts of congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction and in all the tribunals and public offices of the United States and of the several states, without any further proof or authentication thereof.] [A]

ARTICLE 81.

[LEGISLATIVE ACTS OF STATES AND TERRITORIES.]

[The Revised Statutes of the United States provide that the acts of the Legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated

words at the end of the section are regarded as unmeaning by several text writers. See, *e. g.*, R. N. P., 116; 2 Ph. Ev., 241; T. E., s. 7, note 1. Mr. Taylor says that the concluding words of the section were introduced into the act while passing through the house of commons. He adds, they appear to have been copied from 1 and 2 Vict., c. 94, s. 13 (see art. 76) "by some honorable member who did not know distinctly what he was about." They certainly add nothing to the sense.

[A] Rev. Stat. U. S., sec. 908.

by having the seals of such state, territory or country affixed thereto, but this provision does not exclude any other method of proof allowed by the state law, or admitted by the court where the same may be offered in evidence.] [A]

ARTICLE 82.

[RECORDS AND JUDICIAL PROCEEDINGS OF STATE COURTS, ETC.]

[The Revised Statutes of the United States provide that the records and judicial proceedings of the courts of any state or territory, or of any country subject to the jurisdiction of the United States, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken, but this provision does not exclude any other method of proof allowed by the state law, or admitted by the court where the same may be offered in evidence.] [B]

[A] Rev. Stat. U. S., sec. 905.

[B] Rev. Stat. U. S., sec. 905; *Turnbull v. Payson*, 95 U. S. 418, 422; Abbott's Tr. Ev., p. 535.

ARTICLE 83.

[PUBLIC RECORDS OF STATE, ETC., NOT JUDICIAL.]

[The Revised Statutes of the United States provide that all records and exemplifications of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor or secretary of state, the chancellor or keeper of the great seal of the state or territory or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified, or, if given by such governor, secretary, chancellor or keeper of the great seal, it shall be under the great seal of the state, territory or country aforesaid in which it is made. And the said records and exem-

plifications so authenticated shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts and offices of the state, territory or country as aforesaid from which they are taken, but this provision does not exclude any other method of proof allowed by the state law, or admitted by the court where the same may be offered in evidence] [A]

ARTICLE 84.

[FOREIGN ACTS OF STATE, JUDGMENTS, ETC.]

[Foreign laws, acts of state, and judgments may be authenticated by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer properly authorized by law to give the copy, which certificate must itself also be authenticated.] [B]

[A] Rev. Stat. U. S., sec. 906.

[B] *Ennis v. Smith*, 14 How, 400, 426; *Church v. Hubbart*, 2 Cranch, 187, 237; *U. S. v. Wiggins*, 14 Peters, 334, 346; *U. S. v. Rodman*, 15 Peters, 130, 137; *Stein v. Bowman*, 13 Peters, 209, 218; *Watson v. Walker*, 23 N. H., 471, 496; *Buttrick v. Allen*, 8 Mass., 273; 5 Am. D., 105; *Spalding v. Vincent*, 24 Vt., 501, 504; *Delafield v. Hand*, 3 Johns., 310, 313; *Packard v. Hill*, 7 Cowen, 434, 443.

CHAPTER XI.

PRESUMPTIONS AS TO DOCUMENTS.

ARTICLE 85.

PRESUMPTION AS TO DATE OF A DOCUMENT.

When any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practiced, and would, if practiced, injure any person, or defeat the objects of any law.[1] [A]

Illustrations.

(*a*) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to

[1] 1 Ph. Ev., 482–3; T. E., s. 137; Best, s. 403.

[A] *Smith v. Porter*, 10 Gray, 66, 68; *Costigan v. Gould*, 5 Denio, 290, 293; 2 Whar. Ev., secs. 977, 988, 1312; *Knowlton v. Culver*, 2 Pinney, 243; 1 Chandler, 214; 52 Am. D., 156.

the prejudice of creditors whose claims date from the interval between the act of bankruptcy and the adjudication.[1]

(*b*) In a petition for damages on the ground of adultery letters are produced between the husband and wife, dated before the alleged adultery, and showing that they were then on affectionate terms. Further evidence of the date is required to prevent collusion, to the prejudice of the person petitioned against.[2]

ARTICLE 86.

PRESUMPTION AS TO STAMP OF A DOCUMENT.

When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,[3] unless it be shown to have remained unstamped for some time after its execution.[4] [A]

ARTICLE 87.

PRESUMPTION AS TO SEALING AND DELIVERY OF DEEDS.

When any document purporting to be and stamped as a deed, appears or is proved to be or to have been signed and duly attested, it is presumed

[1] *Anderson v. Weston*, 6 Bing. N. C., 302; *Sinclair v. Baggallay*, M. and W., 318.

[2] *Houlston v. Smith*, 2 C. and P., 24.

[3] *Closmadeuc v. Carrel*, 18 C. B., 44. In this case the growth of the rule is traced, and other cases are referred to, in the judgment of Creswell, J.

[4] *Marine Investment Company v. Haviside*, L. R. 5 E. and I. App., 624.

[A] As to presumption regarding cancellation of stamp, see *Rees v. Jackson*, 64 Pa. St., 486, 493.

to have been sealed and delivered, although no impression of a seal appears thereon.[1] [A]

ARTICLE 88.

PRESUMPTION AS TO DOCUMENTS THIRTY YEARS OLD.

Where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested; and the attestation or execution need not be proved, even if the attesting witness is alive and in court.

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of

[1] *Hall v. Bainbridge*, 12 Q. B., 699–710; *Re Sandilands*, L. R. 6 C. P., 411.

[A] *Ward v. Lewis*, 4 Pick., 518, 520; 2 Whar. Ev., section 1314.

the particular case are such as to render such an origin probable.[1] [A].

ARTICLE 89.

PRESUMPTION AS TO ALTERATIONS.

No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document or with the consent of the party to be charged under it or his representative in interest. [B]

[In the United States] this rule [does not, as in England,] extend to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave.[2] [C]

[1] 2 Ph. Ev., 245-8; Starkie, 521-6; T. E., sec. 74 and secs. 593-601; Best., sec. 220.

[2] *Pigot's Case*, 11 Rep., 47; *Davidson v. Cooper*, 11 M. and W.,

[A] *Jackson v. Blanshaw*, 3 Johns., 292, 295; 3 Am. D., 485; *Barr v. Gratz*, 4 Wheat., 213, 221; *Winn v. Patterson*, 9 Peters, 663, 664; see, also, 1 Whar. Ev., secs. 194 to 199, and 703 and 732.

[B] *Martindale v. Follett*, 1 N. H., 95; *Smith v. U. S.*, 2 Wall., 219, 232; *Vose v. Dolan*, 108 Mass., 153; *Plank R. Co. v. Wetsel*, 21 Barb., 56; 1 Whar. Ev., secs. 622, 623, 624; *Holland v. Hatch*, 11 Ind., 497; 71 Am. D., 363; *Hunt v. Gray*, 35 N. J., 227; 10 Am. R., 232; *Draper v. Wood*, 112 Mass., 315; 17 Am. R., 92, and note; see, also, note 10 Am. D., p. 267.

[C] *U. S. v. Spalding*, 2 Mason, 478, 482; *Rees v. Overbaugh*, 6 Cowen, 746, 750; *Nichols v. Johnson*, 10 Conn., 192, 196; *State v. Berg*, 50 Ind., 496, 505; *Hunt v. Gray*, *supra*.

[Alterations and interlineations appearing on the face of a document will, generally speaking, be presumed to have been made contemporaneously with the execution of the instrument, but if any ground of suspicion is apparent upon the face of the instrument the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matter of fact to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence.] [A]

An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

An alteration which in no way affects the rights of the parties or the legal effect of the instrument, is immaterial.[1] [B]

778; 13 M. and W., 343; *Aldous v. Cornwell* L. R. 3 Q. B., 573. This qualifies one of the resolutions in *Pigot's Case.* The judgment reviews a great number of authorities on the subject.

[1] This appears to be the result of many cases referred to in T. E., ss. 1619–20; see, also, judgments in *Davidson v. Cooper*, and *Aldous v. Cornwell*, referred to above.

[A] 1 Gr. Ev., sec. 564; *Wilde v. Armsby*, 6 Cush., 314, 318; *Simpson v. Davis*, 119 Mass., 269, 270; 20 Am. R., 324; *Boothby v. Stanley*, 34 Me., 515, 516; *Bailey v. Taylor*, 11 Conn., 531, 541; 29 Am. D., 321; *Neil v. Case*, 25 Kan. 510; 37 Am. R., 259, note.

[B] *State v. Berg*, 50 Ind., 496, 501; *Vose v. Dolan*, 108 Mass., 153; 11 Am. R., 333.

CHAPTER XII.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE.

ARTICLE 90.*

EVIDENCE OF TERMS OF CONTRACTS, GRANTS, AND OTHER DISPOSITIONS OF PROPERTY REDUCED TO A DOCUMENTARY FORM.

When any judgment of any court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.[1] Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence. [A]

*See Note XXXII. [1] Illustrations (*a*) and (*b*).

[A] *Partridge v. Ins. Co.*, 15 Wall., 573, 579; *Bailey v. R. R. Co.*, 17 Wall., 96, 105; *De Witt v. Berry*, 134 U. S., 306, 315; *Gilbert v. Stockman*, 76 Wis., 62; 20 Am. St. R., 23; 1 Gr. Ev., §§ 85, 86, 87, etc.

Provided that any of the following matters may be proved:

(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated,[1] want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.[2] [A]

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.[3] [B]

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching

[1] *Reffell v. Reffell*, L. R. 1 P. and D., 139. Mr. Starkie extends this to mistakes in some other formal particulars. 3 Star. Ev., 787–8.

[2] Illustration (*c*).

[3] Illustrations (*d*) and (*e*).

[A] *Union Mutual Ins. Co. v. Wilkinson*, 13 Wall., 222, 231; *Oliver v. Oliver*, 4 Rawle, 141; 26 Am. D., 123; *Martin v. Clark*, 8 R. I., 389; 5 Am. R., 586; 2 Whar. Ev., secs. 930 to 935, 977. As to date, see *Deakins v. Hollis, Admr.*, 7 G. and J., 311, 316; as to consideration, *Miller v. Dow*, 133 U. S., 423, 431.

[B] *Fusting v. Sullivan*, 41 Md., 162, 169; *Welz v. Rhodius*, 87 Ind., 1; 44 Am. R., 747; *Chapin v. Dobson*, 78 N. Y., 74; 34 Am. R., 512; *Cobb v. Wallace*, 5 Cold., 539; 98 Am. R., 435; *Durkin v. Cobleigh*, 156 Mass , 108; 32 Am. St. R., 436.

of any obligation under any such contract, grant or disposition of property.[1] [A]

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the statute of frauds, or otherwise.[2] [B]

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.[3] [C]

Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.[4] [D]

[1] Illustrations (*f*) and (*g*). [2] Illustration (*h*).

[3] *Wigglesworth v. Dallison*, and note thereto, S. L. C., 598-628. A late case is *Johnson v. Raylton*, L. R. 7 Q. B. D., 438, in which it was held that evidence was admissible of a custom that in a contract with a manufacturer of iron plates, he warranted them to be of his own make. [4] Illustration (*i*).

[A] *Shughart v. Moore*, 78 Pa. St., 469, 472; *Pike v. Fay*, 101 Mass., 134, 136; *Rearich v. Swinehart*, 11 Pa. St., 233; 51 Am. D., 540; *Ware v. Allen*, 128 U. S., 590; see also note XLIX.

[B] *Monroe v. Perkins*, 9 Pick., 298, 202; *Russell v. Barry*, 115 Mass., 300, 302; *Cummings v. Arnold*, 3 Metc., 486; 37 Am. D., 155; *Piatt's Adm. v. U. S.*, 22 Wall , 496, 507.

[C] *Bliven v. N. E. Screw Co.*, 23 How., 420, 431; *Thompson v. Riggs*, 5 Wall., 663, 679; *Moran v. Prather*, 23 Wall., 492, 503; *Smith v. Clews*, 114 N. Y., 190; 11 Am. St. R., 627.

[D] *Keene v. Meade*, 3 Peters, 1, 7; *Cramer v. Shriner*, 18 Md., 147; *Hersom v. Henderson*, 21 N. H., 224; 53 Am. D., 185; *Thomas v. Barnes*, 156 Mass., 581; 1 Whar. Ev., sec. 77; 1 Gr. Ev. § 90.

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.[1] [A]

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted in it.[2] [B]

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Surinam to London." The goods are shipped in a particular ship, which is lost.

The fact that that particular ship was orally excepted from the policy cannot be proved.[3]

(*b*) An estate called Gotton Farm is conveyed by a deed which describes it as consisting of the particulars described in the first division of a schedule and delineated in a plan on the margin of the schedule.

Evidence cannot be given to show that a close not mentioned in the schedule or delineated in the plan was always treated as part of Gotton Farm, and was intended to be conveyed by the deed.[4]

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[1] Illustration (*j*).

[2] See authorities collected in 1 Ph. Ev., 449–50; T. E., s. 139.

[3] *Weston v. Eames*, 1 Tau., 115.

[4] *Barton v. Dawes*, 10 C. B., 261–265.

[A] *Dutton v. Woodman*, 9 Cush., 225, 262; 57 Am. D., 46; *Spiers v. Willison*, 4 Cranch, 398; Whar. Ev., secs. 78 and 1315–18.

[B] *Bank U. S. v. Dandridge*, 12 Wheat., 64, 70; *McCay v. Curtice*, 9 Wend., 17; *Martin v. State*, 89 Ala., 115; 18 Am. St. R., 91.

(*c*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake.

A may prove that such a mistake was made as would entitle him to have the contract reformed.[1]

(*d*) A lets land to B, and they agree that a lease shall be given by A to B.

Before the lease is given, B tells A that he will not sign it unless A promises to destroy the rabbits. A does promise. The lease is afterwards granted, and reserves sporting rights to A, but does not mention the destruction of the rabbits. B may prove A's verbal agreement as to the rabbits.[2]

(*e*) A and B agree verbally that B shall take up an acceptance of A's, and that thereupon A and B shall make a written agreement for the sale of certain furniture by A to B. B does not take up the acceptance. A may prove the verbal agreement that he should do so.[3]

(*f*) A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.[4]

(*g*) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is verbally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent, and the fact that he does not consent.[5]

(*h*) A agrees in writing to sell B fourteen lots of freehold land, and make a good title to each of them. Afterwards B

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[1] Story's Equity Jurisprudence, chap. v, ss. 153–162.

[2] *Morgan v. Griffiths*, L. R. 6 Ex., 70. And see *Angell v. Duke*, L. R. 10 Q. B., 174.

[3] *Lindley v. Lacey*, 17 C. B. (N. S.), 578.

[4] *Pym v. Campbell*, 6 E. and B., 370.

[5] *Wallis v. Littell*, 11 C. B. (N. S.), 369.

consents to take one lot, though the title is bad. Apart from the statute of frauds this agreement might be proved.[1]

(*i*) A sells B a horse, and verbally warrants him quiet in harness. A also gives B a paper in these words: "Bought of A a horse for *7l. 2s. 6d.*"

B may prove the verbal warranty.[2]

(*j*) The question is, whether A gained a settlement by occupying and paying rent for a tenement. The facts of occupation and payment of rent may be proved by oral evidence, although the contract is in writing.[3]

ARTICLE 91.*

WHAT EVIDENCE MAY BE GIVEN FOR THE INTERPRETATION OF DOCUMENTS.

(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical and provincial expressions, of abbreviations and of common words which, from the context, appear to have been used in a peculiar sense;[4] [A] but evidence may not be given to show

* See Note XXXIII.

[1] *Goss v. Lord Nugent*, 5 B. and Ad., 58, 65.

[2] *Allen v. Prink*, 4 M. and W., 140.

[3] *R. v. Hull*, 7 B. and C., 611. [4] Illustrations (*a*) (*b*) (*c*).

[A] *Sloops v. Smith*, 100 Mass., 63, 66; 1 Am. R., 857; *Bank U. S. v. Dunn*, 6 Peters, 51; *Thorington v. Smith*, 8 Wall., 1, 12; 2 Whar. Ev.; secs. 939, 940; *Smith v. Clews*, 124 N. Y., 190; 11 Am. St. R., 627.

that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.[1] [A]

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.[2] [B]

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer,[3] or which identifies any person or thing mentioned in it.[4] Such facts are hereinafter called the circumstances of the case.[5] [C]

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in

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[1] Illustration (*d*).

[2] Illustrations (*e*) and (*f*).

[3] See all the Illustrations.

[4] Illustration (*g*).

[5] As to proving facts showing the knowledge of the writer, and for an instance of a document which is not admissible for that purpose, see *Adie v. Clark*, L. R., 3, Ch. Div., 134, 142.

[A] *Moran v. Prather*, 23 Wall., 492, 501; *Wilmering v. McGaughey*, 30 Iowa, 205; 6 Am. R., 673, note.

[B] *Peisch v. Dickson*, 1 Mason, 9; *Pingry v. Watkins*, 17 Vt., 379; *Marshall v. Haney*, 4 Md., 498; 59 Am. D., 92.

[C] *Reed v. Ins. Co.*, 95 U. S., 23, 30; *Md. v. B. & O. R. R. Co.*, 22 Wall., 105, 113; Gilmor's Est., 154 Pa. St., 523; 35 Am. St R, 855, 9.

which case they may be interpreted according to their less proper meaning.[1] [A]

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.[2] [B]

(7) If the document applies in part but not with accuracy to the circumstances of the case, the court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.[3] [C]

[1] Illustration (*h*).
[2] Illustration (*i*).
[3] Illustrations (*k*) (*l*) (*m*).

[A] *The Confederate Note Case*, 19 Wall., 548, 559; *Reed v. Ins. Co.*, 95 U. S., 23, 31.

[B] *Partridge v. Life Ins. Co.*, 15 Wall., 573, 578; *McKinn v. Aulbach*, 130 Mass., 481; 39 Am. R. 470; *Charles v. Denis*, 42 Wis., 56; 24 Am. R., 383.

[C] *Atkinson's Lesse v. Cummins*, 9 How., 479, 486; *Reed v. Ins. Co.*, 95 U. S., 28, 30; *Langlois v. Crawford*, 59 Mo., 456, 466; *Heidenheimer v. Bauman*, 84 Tex., 174; 31 Am. St. R., 29.

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.[1] [A]

(9) If the document is of such a nature that the court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.[2] [B]

Illustrations.

(*a*) A lease contains a covenant as to "ten thousand" rabbits. Oral evidence to show that a thousand meant, in relation to rabbits, 1200, is admissible.[3]

(*b*) A sells to B "1170 bales of gambier." Oral evidence is admissible to show that a "bale" of gambier is a package compressed, and weighing 2 cwt.[4]

(*c*) A, a sculptor, leaves to B "all the marble in the yard, the tools in the shop, bankers, mod tools for carving." Evidence to show whether "mod" meant models, moulds or modeling-tools, and to show what bankers are, may be given.

[1] Illustration (*n*).

[2] Illustration (*o*)

[3] *Smith v. Wilson*, 3 B. and Ad., 728.

[4] *Gorrissen v. Perrin*, 2 C. B. (N. S.), 681.

[A] *Mchs. Bk. of Alexandria v. Bk. of Columbia*, 5 Wheat., 326, 337; *Cavazos v. Trevino*, 6 Wall., 773, 784; *Miller v. Stevens*, 100 Mass., 518; 1 Am. R., 139.

[B] *Graves v. Spedden*, 46 Md., 527, 533; *Woolery v. Woolery*, 29 Ind., 245, 253.

(*d*) Evidence may not be given to show that the word "boats," in a policy of insurance, means "boats not slung on the outside of the ship on the quarter."[1]

(*e*) A leaves an estate to K, L, M, etc., by a will dated before 1838. Eight years afterwards A declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof that A was in the habit of calling a particular person M would have been admissible.[2]

(*f*) A leaves a legacy to ——. Evidence to show how the blank was intended to be filled is not admissible.[3]

(*g*) Property was conveyed in trust in 1704 for the support of "Godly preachers of Christ's holy Gospel." Evidence may be given to show what class of ministers were at the time known by that name.[4]

(*h*) A leaves property to his "children." If he has both legitimate and illegitimate children the whole of the property will go to the legitimate children. If he has only illegitimate children, the property may go to them.[5]

(*i*) A testator leaves all his estates in the county of Limerick and city of Limerick to A. He had no estates in the county of Limerick, but he had estates in the county of Clare, of which the will did not dispose. Evidence cannot be given to show that the words "of Clare" had been erased from the draft by mistake, and so omitted from the will as executed.[6]

(*j*) A leaves a legacy to "Mrs. and Miss Bowden." No such persons were living at the time when the legacy was made, but Mrs. Washburne, whose maiden name had been Bowden, was living, and had a daughter, and the testatrix

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[1] *Blackett v. Royal Exchange Co.*, 2 C. and J., 244.

[2] *Clayton v. Lord Nugent*, 13 M. and W.. 200, see 205-6.

[3] *Baylis v. A. G.*, 2 Atk., 239. In *In re Bacon's Will, Camp v. Coe*, L. R. 31 Ch. Div., 460, blanks were left in a will, and parol evidence was admitted to rebut any presumption arising from them against the *prima facie* claims of the executor to the residue undisposed of.

[4] *Shore v. Wilson*, 9 C. and F., 365, 565-5.

[5] Wig. Ext. Ev., pp. 18 and 19, and note of cases.

[6] *Miller v. Travers*, 8 Bing., 244.

used to call them Bowden. Evidence of these facts was admitted.[1]

(*k*) A devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator's declarations of intention, may be proved in order to show which of the two was intended.[2]

(*l*) A devises property to Elizabeth, the natural daughter of B. B. has a natural son John, and a legitimate daughter Elizabeth. The court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for John.[3]

(*m*) A leaves a legacy to his niece, Elizabeth Stringer. At the date of the will he had no such niece, but he had a great-great niece named Elizabeth Jane Stringer. The court may infer from these circumstances that Elizabeth Jane Stringer was intended; but they may not refer to instructions given by the testator to his solicitor, showing that the legacy was meant for a niece, Elizabeth Stringer, who had died before the date of the will, and that it was put into the will by a mistake on the part of the solicitor.[4]

(*n*) A devises one house to George Gord, the son of George Gord, another to George Gord, the son of John Gord, and a third to George Gord the son of Gord. Evidence both of circumstances and of the testator's statements of intention may be given to show which of the two George Gords he meant.[5]

(*o*) A appointed "Percival ——, of Brighton, Esquire, the father," one of his executors. Evidence of surrounding circumstances may be given to show who was meant, and (probably) evidence of statements of intention.[6]

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[1] *Lee v. Pain*, 4 Hare, 251–3.

[2] *Doe v. Hiscocks*, 6 M. and W., 363.

[3] *Ryall v. Hannam*, 10 Beav., 536.

[4] *Stringer v. Gardiner*, 27 Beav., 35; 4 De G. and J., 468.

[5] *Doe v. Needs*, 2 M. and W. 129.

[6] *In the Goods of De Rosaz*, L. R. 2 P. D., 66.

(*p*) A leaves two legacies of the same amount to B, assigning the same motive for each legacy, one being given in his will, the other in a codicil. The court presumes that they are not meant to be cumulative, but the legatee may show, either by proof of surrounding circumstances, or of declarations by the testator, that they were.[1]

ARTICLE 92.*

CASES TO WHICH ARTICLES 90 AND 91 DO NOT APPLY.

Articles 90 and 91 apply only to parties to documents, and to their representatives in interest, and only to cases in which some civil right or civil liability dependent upon the terms of a document is in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document. [A]

See Note XXXIV.

[1] Per Leach, V. C., in *Hurst v. Leach*, 5 Madd., 351, 360-1. The rule in this case was vindicated, and a number of other cases both before and after it were elaborately considered by Lord St. Leonards, when chancellor of Ireland, in *Hall v. Hill*, 1 Dru and War., 94, 111-133. See, too, *Jenner v. Hinch*, L. R. 5 Prob. Div., 106.

[A] *Barreda v. Silsbee*, 21 How., 146, 169; *Still v. Huidekopers*, 17 Wall., 384, 397; also cases cited in 2 Whar. Ev., sec. 923; *McMaster v. Ins. Co. N. America*, 55 N. Y., 222; 14 Am. R., 239; *Coleman v. Pike Co.*, 83 Ala., 326; 3 Am. St. R., 746; *Bruce v. Roper Lumber Co.*, 87 Va., 381; 24 Am. St. R., 657.

Illustrations.

(*a*) The question is, whether A, a pauper, is settled in the parish of Cheadle. A deed of conveyance to which A was a party is produced, purporting to convey land to A for a valuable consideration. The parish appealing against the order was allowed to call A as a witness to prove that no consideration passed.[1]

(*b*) The question is, whether A obtained money from B under false pretenses. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretense. B may give evidence of the false pretense although he executed the deed misstating the consideration for the premium.[2]

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[1] *R. v. Cheadle*, 3 B. and Ad., 833.
[2] *R. v. Adamson*, 2 Moody, 286.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.*

BURDEN OF PROOF.

ARTICLE 93.†

HE WHO AFFIRMS MUST PROVE.

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.[1] [A]

ARTICLE 94.†

PRESUMPTION OF INNOCENCE.

If the commission of a crime is directly in issue, it must [in criminal cases] be proved beyond reason-

* See Note XXXV. † See Note XXXVI.

[1] 1 Ph. Ev., 552; T. E. (from Greenleaf), s. 337; Best, ss. 265–6; Starkie, 585–6.

[A] 1 Gr. Ev., sec. 74; 1 Whar. Ev., secs. 353–356; *Costigan v. R. R. Co.*, 2 Denio, 609, 616; 43 Am. D., 758.

able doubt [but in civil cases it is determined by the preponderance of the evidence]. [A]

The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action. [B]

Illustrations.

(*a*) A sues B on a policy of fire insurance. B pleads that A burnt down the house insured. [If the preponderance of the evidence sustains this plea, the verdict should be for the defendant; but if A is afterwards indicted and tried for arson of the same house, he cannot be convicted unless his guilt be proved beyond a reasonable doubt.] [C]

(*b*) A sues B for damage done to A's ship by inflammable matter loaded thereon by B without notice to A's captain. A must prove the absence of notice.[1]

(*c*) The question in 1819 is, whether A is settled in the parish of a man to whom she was married in 1813. It is proved that in 1812 she was married to another person, who enlisted soon afterwards, went abroad on service, and had

[1] *Williams v. East India Co.*, 3 Ea., 102, 198–9.

[A] There is some conflict of authority as to the *quantity of evidence* necessary to prove in a civil action the commission of a crime. But the weight of the American decisions is in support of the rule laid down in the text. See *Scott v. Ins. Co*, 1 Dillon C. C., 105, 107; *Welch v. Jugenheimer*, 56 Iowa, 11; 41 Am. R., 76; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y., 562; 47 Am. R., 75; also, 2 Whar. Ev., sec. 1246, and cases there cited. For the English rule that the crime must be proved beyond a reasonable doubt even in civil cases, see *Thurtell v. Beaumont*, 1 Bing., 339, and *Kane v. Ins. Co.*, 38 N. J. L., 441, 446; *Barton v. Thompson*, 46 Iowa, 30; 26 Am. R., 131.

[B] 1 Gr. Ev., secs. 34, 35; *Gannon v. Ruffner*, 151 Mass., 204.

[C] See authorities cited under note [A].

not been heard of afterwards. The burden of proving that the first husband was alive at the time of the second marriage is on the person who asserts it.[1] [A]

ARTICLE 95.

ON WHOM THE GENERAL BURDEN OF PROOF LIES.

The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor.[2] [B]

Where there are conflicting presumptions the case is the same as if there were conflicting evidence.[3]

Illustrations.

(*a*) It appears upon the pleadings that A is indorsee of a bill of exchange. The presumption is that the indorsement was for value, and the party interested in denying this must prove it.[4]

(*b*) A, a married woman, is accused of theft and pleads not guilty. The burden of proof is on the prosecution. She is

[1] *R. v. Twyning*, 2 B. and A., 386.

[2] 1 Ph. Ev., 552; T. E., ss. 338-9; Starkie, 586-7 and 748; Best, s. 268; and see *Abrath v. N. E. Ry*, L. R. 11 Q. B. D., 440, especially the judgment of Bowen, L. J., 455-462.

[3] See Illustration (1).

[4] *Mills v. Barber*, 1 M. and W., 425.

[A] *Jones v. Jones*, 45 Md., 144, 157; S. C. 48 Md., 391; 30 Am. R., 466; *Case v. Case*, 17 Cal., 598, 600.

[B] *R. R. Co. v. Gladmon*, 15 Wall., 401, 406; *Colorado Coal & I. Co. v. U. S.*, 123 U. S., 307-19. See, also, authorities cited under article 93.

shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden of proving that she was not coerced by him is shifted on the prosecutor.[1]

(*c*) A is indicted for bigamy. On proof by the prosecution of the first marriage, A proves that at the time he was a minor. This throws on the prosecution the burden of proving the consent of A's parents.[2]

(*d*) A deed of gift is shown to have been made by a client to his solicitor. The burden of proving that the transaction was in good faith is on the solicitor.[3]

(*e*) It is shown that a hedge stands on A's land. The burden of proving that the ditch adjacent to it is not A's also is on the person who denies that the ditch belongs to A.[4]

(*f*) A proves that he received the rent of land. The presumption is, that he is owner in fee simple, and the burden of proof is on the person who denies it.[5]

(*g*) A finds a jewel mounted in a socket, and gives it to B to look at. B keeps it, and refuses to produce it on notice, but returns the socket. The burden of proving that it is not as valuable a stone of the kind as would go into the socket is on B.[6]

(*h*) A sues B on a policy of insurance, and shows that the vessel insured went to sea, and that after a reasonable time no tidings of her have been received, but that her loss had been rumored. The burden of proving that she has not foundered is on B.[7]

(*i*) Z in 1864 married A. In 1868 he was convicted of bigamy, in having in 1868 married B during the life of A. In 1879 he married C. In 1880, C being alive, he married D, and was

[1] 1 Russ. Cri., 33; and 2, 337.

[2] *R. v. Butler*, 1 R. and R., 61.

[3] 1 Story Eq. Juris., s. 310, n. 1; quoting *Hunter v. Atkins*, 3 M. and K., 113.

[4] *Guy v. West*, Selw N. P., 1297.

[5] *Doe v. Coulthred*, 7 A. and E., 235.

[6] *Armoury v. Delamirie*, 1 S. L. C., 357.

[7] *Koster v. R ed*, 6 B. and C., 19.

prosecuted for bigamy in marrying D in the lifetime of C. The prisoner, on his second trial, proved the first conviction, thereby proving that A was living in 1868. No further evidence was given. A's being alive in 1868 raises a presumptien that she was living in 1879. Z's marriage to C in 1879 being presumably innocent, raises a presumption that A was then dead. The inference ought to have been left to the jury.[1]

ARTICLE 96.

BURDEN OF PROOF AS TO PARTICULAR FACT.

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person;[2] but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. [A]

Illustrations.

(*a*) A prosecutes B for theft, and wishes the court to believe that B admitted the theft to C. A must prove the admission.

B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it.

[1] *R. v. Willshire*, L. R. 6 Q. B. D., 366.

[2] For instances of such provisions see T. E., ss. 345–6.

[A] *Clements v. Moore*, 6 Wall., 299, 315; *U. S. v. Hayward*, 2 Gall., 485, 497; *Great West R. R. v. Bacon*, 30 Ill. 347, 352; *Goodwin v. Smith*, 72 Ind., 113; 37 Am. R., 144, note; *City of Fort Smith v. Dodson*, 51 Ark., 417; 14 Am. St. R., 62.

(*b*) A, a shipowner, sues B, an underwriter, on a policy of insurance on a ship. B alleges that A knew of and concealed from B material facts. B must give enough evidence to throw upon A the burden of disproving his knowledge; but slight evidence will suffice for this purpose.[1]

(*c*) In an action for malicious prosecution the plaintiff must prove (1) his innocence; (2) want of reasonable and probable cause for the prosecution; (3) malice or indirect motive; and he must prove all that is necessary to establish each proposition sufficiently to throw the burden of disproving that proposition on the other side.[2]

(*d*) In actions for penalties under the old game laws, though the plaintiff had to aver that the defendant was not duly qualified, and was obliged to give general evidence that he was not, the burden of proving any definite qualification was on the defendant.[3]

ARTICLE 97.

BURDEN OF PROVING FACT TO BE PROVED TO MAKE EVIDENCE ADMISSIBLE.

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) A wishes to prove a dying declaration by B.

A must prove B's death, and the fact that he had given up all hope of life when he made the statement.

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[1] *Elkin v. Janson*, 13 M. and W., 655. See, especially, the judgment of Alderson, B., 663–6.

[2] *Abrath v. Northeastern Railway*, L. R. 11 Q. B. D., 441.

[3] 1 Ph. Ev., 556, and cases there quoted. The illustration is founded more particularly on *R. v. Jarvis*, in a note to *R. v. Stone*, 1 Ea., 639, where Lord Mansfield's language appears to imply what is stated above.

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

ARTICLE 97A.

BURDEN OF PROOF WHEN PARTIES STAND IN A FIDUCIARY RELATION.

When persons stand in a relation to each other of such a nature that the one reposes confidence in the other, or is placed by circumstances under his authority, control or influence, when the question is as to the validity of any transaction between them from which the person in whom confidence is reposed or in whom authority or influence is vested derives advantage, the burden of proving that the confidence, authority or influence was not abused, and that the transaction was in good faith and valid, is on the person in whom such confidence or authority or influence is vested, and the nature and amount of the evidence required for this purpose depends upon the nature of the confidence or authority, and on the character of the transaction.[1][A]

[1] See Story's Equity, para. 307 and following. Also, Taylor on Evidence, sec. 129 and following. The illustrations of the principle are innumerable, and various.

[A] *Fisher v. Bishop*, 108 N. Y., 25; 2 Am. St. R., 357; *Darlington's Est.*, 147 Pa. St., 624; 30 Am. St. R., 776; *Hugheim v. Basely*, 2 Lead. Cas. Eq., 1156.

CHAPTER XIV.

*ON PRESUMPTIONS AND ESTOPPELS.**

ARTICLE 98.

PRESUMPTION OF LEGITIMACY.

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown,

either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband,

or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred. [A]

* See Note XXXV.

[A] *Stegall v. Stegall*, 2 Brock., 256, 263–69; *Sullivan v. Kelly*, 3 Allen, 148, 150; *Com. v. Shepherd*, 6 Binn., 283, 286; 6 Am. D., 449; *Egbert v. Greenwalt*, 44 Mich., 245; 38 Am. R., 260.

Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other, nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, [A] provided that in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.[1] [B]

Letters written by the mother may as part of the *res gestæ* be admissible evidence to show illegitimacy, though the mother could not be called as a witness to prove the statements contained in such letters.[2]

[1] *R. v. Luffe*, 8 Ea., 207; *Cope v. Cope*, 1 Mo. and Ro., 272–4 *Legge v. Edmonds*, 25 L. J. Eq., 125, see p. 135; *R. v. Mansfield*, 1 Q. B., 444; *Morris v. Draeger*, 3 C. and P., 215. See as an illustration of these principles, *Hawes v. Davies*, L. R., 23, Ch. Div., 173. I am not aware of any decision as to the paternity of a child born say six months after the death of one husband, and three months after the mother's marriage to another. Amongst common soldiers in India such a question might easily arise. The rule in European regiments is that a widow not remarried within the year (it used to be six months) must leave the regiment; the result was, and is, that widowhoods are usually very short.

[2] *Aylesford Peerage Case*, 11 Q. B. D., 1 in which the general rule stated above is considered and affirmed.

[A] *Tioga Co. v. S. Creek Township*, 75 Pa. St., 433, 436; *Chamberlain v. People*, 23 N. Y., 85, 88; 80 Am. D., 255; *Boykin v. Boykin*, 70 N. C., 262; 16 Am. R., 776. See *Scanlon v. Walshe*, 81 Md., 118.

[B] *Com. v. Connelly*, 1 Brown (Pa.), 284; *Com. v. Shepherd*, 6 Binn., 283, 286; 6 Am. D., 449; *State v. Pettaway*, 3 Hawks., 623, 625.

ARTICLE 99.

PRESUMPTION OF DEATH FROM SEVEN YEARS' ABSENCE.

A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.[1] [A]

There is no presumption as to the age at which a person died who is shown to have been alive at a given time, or as to the order in which two or more

[1] *McMahon v. McElroy*, 5 Ir. Rep. Eq., 1; *Hopewell v. De Pinna*, 2 Camp., 113; *Nepeau v. Doe*, 2 S. L. C., 562, 681; *Nepeau v. Knight*, 2 M. and W., 894. 912; *R. v. Lumley*, L. R., 1 C. C. R., 196; and see the caution of Lord Denman in *R. v. Harborne*, 2 A. and E., 544. All the cases are collected and considered in *In re Phené's Trust*, L. R. 5 Ch. App., 139. The doctrine is also much discussed in *Prudential Assurance Company v. Edmunds*, L. R. 2 App. Cas., 487. The principle is stated to the same effect as in the text in *Re Corbishley's Trusts*, L. R. 14 Ch. Div., 846.

[A] *Hancock Ins. Co.*, 62 Mo., 26, 30; *Montgomery v. Bevans*, 1 Sawy. 660; *Burr v. Sim*, 4 Whar., 150; 33 Am. D., 50; *Hoyt v. Newbold*, 16 Vroom., 219; 46 Am. R., 757, and note. *Sprigg v. Moale*, 28 Md., 497; 92 Am. D., 98; *Doud v. Watson*, 105 N. C., 476; 18 Am. St R., 920.

persons died who are shown to have died in the same accident, shipwreck or battle.[1] [A]

ARTICLE 100.

*PRESUMPTION OF LOST GRANT.

When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the [state,] or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin, and that it was created by a proper instrument which has been lost. [B]

Illustrations.

(*a*) The question is, whether B is entitled to recover from A the possession of lands which A's father and mother successively occupied from 1754 to 1792 or 1793, and which B had occupied (without title) from 1793 to 1809. The lands formed originally an encroachment on the Forest of Dean.

[1] *Wing v. Angrave*, 8 H. L. C., 183, 198; and see authorities in last note.

* The subject of the doctrine of lost grants is much considered in *Angus v. Dalton*, L. R. 3 Q. B. D., 84; affirmed, L. R. 6 App. Cas., 740.

[A] *Coy v. Leach*, 8 Metc., 371, 372; 41 Am. D., 518; *Newell v. Nichols*, 75 N. Y., 78; 31 Am. R., 424.

[B] *Ricard v. Williams*, 7 Wheat., 59, 109; *Casey's Lessee v. Inloes*, 1 Gill., 430; 39 Am. D., 658.

The undisturbed occupation for thirty-nine years raises a presumption of a grant from the crown to A's father.[1]

(*b*) A fishing mill-dam was erected more than 110 years before 1861, in the River Derwent, in Cumberland (not being navigable at that place), and was used for more han sixty years before 1861, in the manner in which it was used in 1861. This raises a presumption, that all the upper proprietors whose rights were injuriously affected by the dam, had granted a right to erect it.[2]

(*c*) A borough corporation proved a prescriptive right to a several oyster fishery in a navigable tidal river. The free inhabitants of ancient tenements in the borough proved that from time immemorial and claiming as of right they had dredged for oysters, within the limits of the fishery, from February 2 to Easter eve in each year. The court presumed a grant from the Crown to the corporation before legal memory of a several fishery, with a condition in it that the free inhabitants of ancient tenements in the borough should enjoy each a right.[3]

(*d*) A builds a windmill near B's land in 1829, and enjoys a free current of air to it over B's land as of right, and without interruption till 1860. This enjoyment raises no presumption of a grant by B of a right to such a current of air, as it would not be natural for B to interrupt it.[4]

(*e*) No length of enjoyment (by means of a deep well) of water, percolating through underground undefined passages, raises a presumption of a grant from the owners of the ground under which the water so percolates of a right to the water.[5]

[1] *Goodtitle v. Baldwin*, 11 Ea., 488. The presumption was rebutted in this case by an express provision of 20 Ch. II., c. 3, avoiding grants of the Forest of Dean. See, also, *Doe d. Devine v. Wilson*, 10 Moo. P. C., 502.

[2] *Leconfield v. Lonsdale*, L. R. 5 C. P., 657.

[3] *Goodman v. Mayor of Saltash*, L. R. 6 App. Cas., 633 (see especially 650). Lord Blackburn dissented, on the ground that such a grant would not have been legal (pp. 651–62). See same case in L. R. 6 Q. B. D., 106, and 5 C. P. D., 431, both of which were reversed.

[4] *Webb v. Bird*, 13 C. B. (N. S.), 841.

[5] *Chasemore v. Richards*, 7 H. L. C., 349.

ARTICLE 101.*

PRESUMPTION OF REGULARITY AND OF DEEDS TO COMPLETE TITLE.

When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with. [A]

When a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.[1] [B]

ARTICLE 102.†

ESTOPPEL BY CONDUCT.

When one person by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his repre-

* See Note XXXVII, and *Macdougall v. Purrier*, 3 Bligh, N. C., 433. *R. v. Cresswell*, L. R. 1 Q. B. D. (C. C. R.), 446, is a recent illustration of the effect of this presumption.

† See Note XXXVIII.

[1] *Doe d. Hammond v. Cooke*, 6 Bing., 174, 179.

[A] *Bank U. S. v. Dandridge*, 12 Wheat., 64, 69; *Cofield v. McClelland*, 16 Wall., 331, 334; *Applegate v. Lexington, etc., Co.*, 117 U. S., 255, 268.

[B] *French v. Edwards*, 21 Wall., 147; *Jackson v. Moore*, 13 Johns., 517; 7 Am. D. 398.

sentative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing. [A]

When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act. [B]

Illustrations.

(*a*) A, the owner of machinery in B's possession, which is taken in execution by C, abstains from claiming it for some months, and converses with C's attorney without referring to his claim, and by these means impresses C with the belief

[A] *Morgan v. R. R. Co.*, 96 U. S., 716; *Drew v. Kimball*, 43 N. H., 282; 80 Am. D., 163; *Anderson v. Hubble*, 93 Ind., 570; 47 Am. R., 394; *Barnard v. Campbell*, 55 N. Y., 456, 462; 17 Am. R., 208; *Zuchtman v. Roberts*, 109 Mass., 53, 54; 12 Am. R., 663.

[B] *Chapman v. Rose*, 56 N. Y., 137, 140; 15 Am. R., 401; *Putnam v. Sullivan*, 4 Mass., 45, 53; 3 Am. D., 206; *Leather Mnfrs. Bank v. Morgan*, 117 U. S., 96.

that the machinery is B's. C sells the machinery. A is estopped from denying that it is B's.[1]

(*b*) A, a retiring partner of B, gives no notice to the customers of the firm that he is no longer B's partner. In an action by a customer, he cannot deny that he is B's partner.[2]

(*c*) A sues B for a wrongful imprisonment. The imprisonment was wrongful, if B had a certain original warrant; rightful, if he had only a copy. B had in fact a copy. He led A to believe that he had the original, though not with the intention that A should act otherwise than he actually did, nor did A so act. B may show that he had only a copy and not the original.[3]

(*d*) A sells eighty quarters of barley to B, but does not specifically appropriate to B any quarters. B sells sixty of the eighty quarters to C. C informs A, who assents to the transfer. C being satisfied with this, says nothing further to B as to delivery. B becomes bankrupt. A cannot, in an action by C to recover the barley, deny that he holds for C on the ground that, for want of specific appropriation, no property passed to B.[4]

(*e*) A signs blank cheques and gives them to his wife to fill up as she wants money. A's wife fills up a cheque for £50 2s. so carelessly that room is left for the insertion of figures before the 50 and for the insertion of words before the "fifty." She then gives it to a clerk of A's to get it cashed. He writes 3 before 50 and "three hundred and" before "fifty." A's banker pays the cheque so altered in good faith. A cannot recover against the banker.[5]

(*f*) A railway company negligently issues two delivery orders for the same wheat to A, who fraudulently raises money from B as upon two consignments of different lots of wheat. The railway is liable to B for the amount which A fraudulently obtained by the company's negligence.[6]

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[1] *Pickard v. Sears*, 6 A. and E., 469, 474.

[2] (Per Parke, B.) *Freeman v. Cooke*, 2 Ex., 661.

[3] *Howard v. Hudson*, 2 E. and B., 1.

[4] *Knights v. Wiffen*, L. R. 5 Q. B., 660.

[5] *Young v. Grote*, 4 Bing., 253.

[6] *Coventry v. G. E. R.*, L. R. 11 Q. B. D., 776.

(*g*) A carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief.[1]

ARTICLE 103.

ESTOPPEL OF TENANT AND LICENSEE.

No tenant and no person claiming through any tenant of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into possession or paid the rent, a title to such land or hereditament;[2] [A] and no person who came upon any land by the license of the person in possession thereof is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such license was given.[3] [B]

[1] Per Blackburn, J., in *Swan v. N. B. Australasian Co.*, 2 H. and C., 181. See *Baxendale v. Bennett*, 3 Q. B. D., 525. The earlier cases on the subject are much discussed in *Jorden v. Money*, 5 H. and C., 209–16, 234–5.

[2] *Doe v. Barton*, 11 A. and E., 307; *Doe v. Smyth*, 4 M. and S., 347: *Doe v. Pegg*, 1 T. R., 760 (note).

[3] *Doe v. Baytup*, 3 A. and E., 188.

[A] *State v. Rutherford*, 92 U. S., 107; *Emerick v. Taverner*, 9 Gratt., 220; 58 Am. D., 217.

[B] *Hoen v. Simmons*, 1 Cal., 119; 52 Am. D., 290.

ARTICLE 104.

ESTOPPEL OF ACCEPTOR OF BILL OF EXCHANGE.

No acceptor of a bill of exchange is permitted to deny the signature of the drawer or his capacity to draw, or if the bill is payable to the order of the drawer, his capacity to endorse the bill, though he may deny the fact of the endorsement;[1] nor if the bill be drawn by procuration, the authority of the agent, by whom it purports to be drawn, to draw in the name of the principal,[2] though he may deny his authority to endorse it.[3] If the bill is accepted in blank, the acceptor may not deny the fact that the drawer endorsed it.[4] [A]

ARTICLE 105.

ESTOPPEL OF BAILEE, AGENT, AND LICENSEE.

No bailee, agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively was entitled to those goods at the time when they were so entrusted.

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[1] *Garland v. Jacomb*, L. R. 8 Ex., 216.
[2] *Sanderson v. Coleman*, 4 M. and G., 209.
[3] *Robinson v. Yarrow*, 7 Tau., 455.
[4] *L. & S. W. Bank v. Wentworth*, L. R. 5 Ex. D., 96.

[A] *U. S. Bk. vs. Bk. of Georgia*, 10 Wheat., 333, 353; *Nat. Park Bk. v. Ninth Nat. Bk.*, 46 N. Y., 77; 7 Am. R., 310; 1 Chalm. Dig. Bills Exch., Art. 212; see [Article 110 A.]

Provided that any such bailee, agent, or licensee, may show, that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor, wrongfully and without notice to the bailee, agent, or licensee, obtained the goods from a third person who has claimed them from such bailee, agent, or licensee.[1] [A]

[1] *Dixon v. Hammond*, 2 B. and A., 313; *Crossley v. Dixon*, 10 H. L. C., 293; *Gosling v. Birnie*, 7 Bing., 339; *Hardman v. Wilcock*, 9 Bing., 382; *Biddle v. Bond*, 34 L. J. Q. B., 137; *Wilson v. Anderton*, 1 B. and Ad., 450. As to carriers, see *Sheridan v. New Quay*, 4 C. B. (N. S.), 618.

[A] *The Idaho*, 93 U. S., 575; *King v. Richards*, 6 Whar., 418, 421; *Burton v. Wilkinson*, 18 Vt., 186; 46 Am. D., 145; *Pulliam v. Burlingame*, 81 Mo., 111; 51 Am. R., 229.

CHAPTER XV.

*OF THE COMPETENCY OF WITNESSES.**

ARTICLE 106.

WHO MAY TESTIFY.

All persons are competent to testify in all cases except as hereinafter excepted.

ARTICLE 107.†

WHAT WITNESSES ARE INCOMPETENT.

A witness is incompetent if, in the opinion of the judge, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth. [A]

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make

* See Note XXXIX.

† See Note XL. A witness under sentence of death was said to be incompetent in *R. v. Webb*, 11 Cox, 133, *sed quaere.*

[A] *State v. Whittier*, 21 Me., 341, 347; 38 Am. D., 272; *McGuire v. People*, 44 Mich., 286; 37 Am. R., 265; 1 Gr. Ev., secs. 365, 367; 1 Whar. Ev., secs. 398–403; *Dist. Col. v. Armes*, 107 U. S., 519.

it intelligible; but such writing must be written, and such signs made in open court. Evidence so given is deemed to be oral evidence. [A]

[At common law all persons who were parties to the record, or had a pecuniary interest in the result of the suit, were incompetent to testify, but by the Revised Statutes of the United States, section 858, it is provided that in the courts of the United States no witness shall be excluded "in any civil action because he is a party to, or interested in, the issue tried: *Provided*, That in actions by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." The result of this statute is to put the parties to a suit (except those named in the proviso) upon an equality with other witnesses—that is to say, to make all admissible to testify for themselves and all compellable to testify for others. [B]

Statutes to the same general effect and purpose, although differing in their terms, have been enacted in all the states and territories of the Union. [C]

[A] *State v. De Wolf*, 8 Conn., 93, 97; *Snyder v. Nations*, 5 Blackf., 295.

[B] *Texas v. Chiles*, 21 Wall., 488. Parties to suit may testify by deposition like other witnesses: *Cornett v. Williams*, 20 Wall., 243; *Railroad Co. v. Pollard*, 22 Wall., 341, 350.

[C] 1 Whar. Ev., secs. 464–477.

Witnesses not believing in the existence of a God who dispenses retribution either in this world or in the next are, at common law, incompetent to testify; [A] but this rule has been modified by constitutional provisions or statutes in several of the states.

Witnesses convicted of crimes rendering them infamous (which comprehend treason, felony, and the *crimen falsi*) [B] are excluded from giving testimony in the courts of the state or country in which they were convicted, unless the disability is removed by a reversal of the judgment or by a pardon. In most of the states the disqualification of infamy has been removed by constitutional provision or by statute, but a conviction may be proved to affect the credibility of the witness.] [C]

[A] *Omichund v. Barker*, 1 Sm. Lea. Cas., 7 Am. ed., *535, *545; *Curtiss v. Strong*, 4 Day, 51; 4 Am. D., 179.

[B] Prof. Greenleaf defines the *crimen falsi* of the common law as an offense "which not only involves the charge of falsehood, hut also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud:" 1 Gr. Ev., sec. 373.

[C] 1 Gr. Ev., secs. 372–377; 1 Whar. Ev., sec. 397, and cases there cited. See, also, *State v. Grant*, 79 Mo., 113; 49 Am. R., 218; *Gertz v. Fitchburg R. R. Co.*, 137 Mass., 77; 50 Am. R., 285.

ARTICLE 108.*

COMPETENCY IN CRIMINAL CASES.

In criminal cases the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, and tried at the same time,[1] is incompetent to testify.[2]

Provided that in any criminal proceedings against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify.[3]

[In many of the states, however, it has been provided by statute that in criminal cases the accused and their wives or husbands shall be competent, but not compellable to testify.] [A]

* See Note XLI.

[1] Not if they are tried separately. *Windsor v. R.*, L. R. 1 Q. B., 390; *Re Bradlaugh*, 15 Cox, 257.

[2] *R. v. Payne*, L. R. 1 C. C. R., 349; and *R. v. Thompson*, *Ib.*, 377.

[3] *Reeve v. Wood*, 5 B. and S., 364. Treason has been also supposed to form an exemption. See T. E., s. 1237.

[A] So also in U. S. courts. See Rev. Stats. U. S., § 858A, Act Cong. March 19, 1878, ch. 37.

ARTICLE 109.

[HUSBAND AND WIFE.]

[At common law husband and wife are incompetent to testify for or against each other, except that in all cases of personal injuries committed by the one against the other, the party injured is an admissible witness against the other, [A] and that in the few cases where parties to the suit may themselves,

[A] 1 Gr. Ev., Sec. 343; *Turner v. State*, 60 Miss.; 45 Am. R., 412.

There is some confusion in the authorities as to the reason of the incompetency of husband and wife to testify for or against each other at common law. Mr. Starkie (Ev., vol. I, p. 142), says: "Whether the exclusion of the evidence of the wife at common law depended upon the identity of interest between her and her husband, or the interest which society has to preserve the peace and confidence of families has been strongly disputed." And Judge Greenleaf (Ev., vol. I, § 334) says: "This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent."

While the common law rule, excluding parties interested in the result of a suit from testifying therein, prevailed, the identity of interest between husband and wife was of itself a conclusive reason for excluding either of them from being a witness in any suit to which the other was a party; but although the principle of public policy requiring the confidence subsisting between husband and wife to be fully protected undoubtedly demands that neither of them be even permitted to disclose confidential communications made during the coverture, or should ever be compelled to testify

upon grounds of necessity, be permitted to testify to a limited extent, the testimony of their wives may be received to the same extent. [A]

To this rule the act of congress making parties to suits competent witnesses has no application, [B] but in most of the states the disqualification has, to a greater or less extent, been removed by statute. Generally, under these statutes, husband and wife are not compellable to testify against each other in criminal proceedings, and in some of them are not competent witnesses in actions for divorce.]

ARTICLE 110.

COMMUNICATIONS DURING MARRIAGE.

No husband is [permitted] to disclose any [confidential] communication made to him by his wife during the marriage, and no wife is [permitted] to disclose any [confidential] communication made to her by her husband during the marriage. [This privilege does not extend to communications made

against the other, yet it is difficult to perceive how this principle of public policy would be infringed by making them *competent* to testify in each other's favor whenever they might choose to do so voluntarily.

[A] *McGill v. Rowand*, 3 Pa. St., 451, 45 Am. D., 654; *Illinois R. R. v. Taylor*, 24 Ill., 323, and *Sasam v. Clark*, 37 Ga., 242, where wives testified as to contents of lost trunks, and *Littlefield v. Rice*, 10 Metc., 287, where wife proved her husband's shop books, were all decided upon the ground that the husbands were themselves competent witnesses in these cases.

[B] *Lucas v. Brooks*, 18 Wall., 436, 452; *Gee v. Scott*, 48 Texas, 510; 26 Am R., 331.

in the presence or hearing of third persons capable of understanding them. It is not terminated by the death of one of the parties, or by a dissolution of the marriage. It is independent of the common law disability of husband and wife to testify for or against each other, and is therefore not affected by the statutes removing such disability.] [A]

ARTICLE 110 A.

[PARTIES TO NEGOTIABLE INSTRUMENTS INCOMPETENT TO IMPEACH THEM.]

[Many American courts hold that parties to a negotiable instrument who have given it credit and currency by their signatures are not afterwards competent witnesses even in suits between other persons to impeach its validity. But the decisions in different states are conflicting upon this point.] [B].

[A] *Dickerman v. Graves*, 6 Cush., 308; 53 Am. D., 41; *Allison v. Barrow*, 3 Cold., 414; 91 Am. D., 291.

[B] See Note L, p. 256*b*, post.

ARTICLE 111.

[JUDGES—THEIR COMPETENCY AND PRIVILEGES.]

[A presiding judge may not be sworn as a witness in a cause before him. [A] Judges and justices of the peace cannot be asked to disclose anything that transpired at their consultations, but may be examined as to what took place at a former trial, in order to identify a case or establish facts which do not appear from the record, or to prove the testimony of a witness.] [B]

ARTICLE 112.

EVIDENCE AS TO AFFAIRS OF STATE.

No person can be compelled to give evidence relating to any affairs of state, or [to communications with public officers about matters pertaining to their official duties, in so far as such examination would, in the opinion of the court, make disclosures injurious to the public interests. The executive of the nation, or of a state, and cabinet officers, are entitled, in the exercise of their discretion, to deter-

[A] *People v. Miller*, 2 Park. C. R., 197, 200; *Morss v. Morss*, 11 Barb., 510; 1 Whar. Ev., 600.

[B] *Heyward's Case*, 1 Sandf., 701, 704; *Jackson v. Humphrey*, 1 Johns., 498; *Welcome v. Batchelor*, 23 Me., 85, 88.

mine how far in a judicial inquiry they will produce papers or answer questions as to public affairs. [A]

Nor can any one be compelled] to give evidence of what took place in either house of [the Legislature], without the leave of the house, though he may state that a particular person acted as speaker.[1]

ARTICLE 113.

INFORMATION AS TO COMMISSION OF OFFENSES.

[All communications in regard to the commission of offenses made to public officers, with a view to the prosecution or detection of suspected offenders, are privileged, and neither the communications themselves, nor the name of the person who made them, may be divulged without the consent of said person.] [B]

ARTICLE 114.

COMPETENCY OF JURORS.

A petty juror may not,[2] [C] and it is doubtful

[1] *Chubb v. Salomons*, 3 Car. and Kir., 77; *Plunkett v. Cobbett*, 5 Esp., 136.

[2] *Vaise v. Delaval*, 1 T. R., 11; *Burgess v. Langley*, 5 M. and G., 722.

[A] *Totten v. U. S.*, 92 U. S.,105; *Burr's Trial*, 186; *Marbury v Madison*, 1 Cranch, 137, 144; *Gray v. Pentland*, 2 S. and R., 23; *Worthington v. Scribner*, 109 Mass., 487, 488; 12 Am. R., 736.

[B] *Oliver v. Pate*, 41 Ind., 132, 141; *U. S. v. Moses*, 4 Wash. C. C., 726; *Worthington v. Scribner*, 109 Mass., 487, 488; 12 Am. R., 736.

[C] *Studley v. Hall*, 22 Me., 198, 201; *Cluggage v. Swan*, 4 Binn., 150, 155; 5 Am. D., 150; *Hannum v. Belchertown*, 19 Pick., 311, 313.

whether a grand juror may,[1] [A] give evidence as to what passed between the jurymen in the discharge of their duties; [but both grand [B] and petty jurors [C] are competent witnesses to prove what issues were actually passed on by the jury, when it becomes a material question in any subsequent proceedings. Grand jurors may also give evidence as to what was the testimony of particular witnesses before them, whenever the purposes of public justice or the establishment of private rights require it.] [D]

ARTICLE 115.*

PROFESSIONAL COMMUNICATIONS.

No legal adviser is permitted, whether during or after the termination of his employment as such,

* See Note XLIII. [1] 1 Ph. Ev., 140; T. E., s. 863.

[A] As to whether it may be proved by members of the grand jury, that twelve of them did not concur in finding the indictment, the authorities are conflicting. Although the majority of decisions are against admitting the testimony, those in favor of it seem to be more correct upon principle. See *McLellan v. Richardson*, 1 Shepl., 82, 86; *State v. Fassett*, 16 Conn., 457, 466; *State v. Beebe*, 17 Minn., 241, 243; *State v. McLeod*, 1 Hawks., 344; *Contra*, *Low's Case*, 4 Me., 439, 444; 16 Am. D., 271; *Richie v. Holbrook*, 7 S. and R., 458. See, also, *Huidekoper v. Cotton*, 3 Watts., 56; *People v. Hurlbut*, 4 Denio, 133, 135; 47 Am. D., 244.

[B] *Com. v. Hill*, 11 Cush., 137, 140; *Com. v. Mead*, 12 Gray, 167, 170.

[C] *Follansbee v. Walker*, 74 Penn. St., 306, 310.

[D] *State v. Benner*, 64 Me., 267, 283. See, also, 1 Whar. Ev., sec. 601.

unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser. [A]

This article does not extend to—

(1) Any such communication as aforesaid made in furtherance of any criminal purpose, whether such purpose was, at the time of the communication, known to the professional adviser or not.[1] [B]

(2) Any fact observed by any legal adviser, in the course of his employment as such, showing that

[1] *R. v. Cox and Railton*, L. R. 14 Q. B. D., 153. The judgment in this case is that of ten judges in the Court for Crown Cases Reserved, and examines minutely all the cases on the subject. These cases put the rule on the principle, that the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal—a conspirator or accessory as the case may be.

[A] *Chirac v. Reinecker*, 11 Wheat., 280, 294; *Bacon v. Frisbie*, 80 N. Y., 394; 36 Am. R., 627; *Snow v. Gould*, 74 Me., 540; 43 Am. R., 604; *McLellan v. Longfellow*, 32 Me., 494; 54 Am. D., 599; *Thorne v. Kilborne*, 28 Vt., 750; 67 Am. D., 742.

[B] *People v. Blakely*, 4 Parker C. R., 176, 180: *Bk. of Utica v. Mersereau*, 4 Barb. Ch., 528, 598; 49 Am. D., 189, 223.

any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not.

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such.[A]

The expression "legal adviser" includes [counsel] and [attorneys],[1] their clerks[2] and interpreters between them and their clients. [B] It does not include officers of a corporation through whom the corporation has elected to make statements.[3]

Illustrations.

(*a*) A, being charged with embezzlement, retains B, a barrister, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of B's employment.

[1] *Wilson v. Rastall*, 4 T. R., 753. As to interpreters, *Ib.*, 756.

[2] *Taylor v. Foster*, 3 C. and P., 195; *Foote v. Hayne*, 1 C. and P., 545.

Quære, whether licensed conveyancers are within the rule? Parke, B., in *Turquand v. Knight*, 7 M. and W., 100, thought not. Special pleaders would seem to be on the same footing.

[3] *Mayor of Swansea v. Quirk*, L. R. 5 C. P. D., 106. Nor pursuivants of the Herald's College: *Slade v. Tucker*, L. R. 14 Ch. Div., 1886.

[A] *Chirac v. Reinecker*, 11 Wheat., 280, 294; *Crosby v. Berger*, 11 Paige, 377, 378; 42 Am. D., 117; *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. D., 287.

[B] *Jackson v. French*, 3 Wend., 337, 339; 20 Am. D., 699; *Sibley v. Waffle*, 16 N. Y., 180, 183. As to conveyancers, see *De Wolf v. Strader*, 26 Ill., 255; 79 Am. D., 371, and note. Contra, *Crane v. Barkdoll*, 59 Md., 534, 538.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A against the prosecutor in the original case for malicious prosecution.[1]

(*b*) If a legal adviser witnesses a deed, he must give evidence as to what happened at the time of its execution.[2]

(*c*) A retains B, an attorney, to prosecute C (whose property he had fraudulently acquired) for murder, and says, "It is not proper for me to appear in the prosecution for fear of its hurting me in the cause coming on between myself and him; but I do not care if I give £10,000 to get him hanged, for then I shall be easy in my title and estate." This communication is not privileged.[3]

ARTICLE 116.

CONFIDENTIAL COMMUNICATIONS WITH LEGAL ADVISERS.

No one can be compelled to disclose to the court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter referred[4] [A]

[1] *Brown v. Foster*, 1 H. and N., 736.

[2] *Crawcour v. Salter*, L. R. 18 Ch. Div., pp. 34–5.

[3] *Annesley v. Anglesea*, 17 S. T., 1223–4.

[4] *Minet v. Morgan*, L. R., 8 Ch. App., 361, reviewing all the cases, and adopting the explauation given in *Pearse v. Pearse*, 1 De G. and S., 18–31, of *Radcliffe v. Fursman*, 2 Br. P. C., 514. A recent illustration will be found in *Mayor of Bristol v. Cox*, L. R., 26 Ch. Div., 678.

[A] *Hemenway v. Smith*, 28 Vt., 701, 707; *Carnes v. Platte*, 36 N. Y., Sup. Ct., 361, 365; *Bigler v. Reyher*, 43 Ind., 112; *State v. White*, 19 Kans., 445; 27 Am. R., 137; but see *contra*, *Inhabitants of Woburn v. Henshaw*, 101 Mass., 193, 200; 3 Am. R., 333.

ARTICLE 117.*

CLERGYMEN AND MEDICAL MEN.

Medical men[1] and (probably) clergymen [A] may be compelled to disclose communications made to them in professional confidence. [But in many of the states such communications are privileged by statute.] [B]

ARTICLE 118.

PRODUCTION OF [DOCUMENTS BY] WITNESS NOT A PARTY.

No witness who is not a party to a suit can be compelled to produce [any document unless the same appears to be relevant to the issue, or to some fact deemed to be relevant to the issue], or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture ;[2] but a witness is not entitled to refuse to produce a document in his possession only because

* See Note XLIV.

[1] *Duchess of Kingston's Case*, 20 S. T., 572–3. As to clergymen, see Note XLIV.

[2] *Whitaker v. Izod*, 2 Tau., 115.

[A] *Com. v. Drake*, 15 Mass., 161; *Simon v. Gratz*, 2 Penn. R.. 412.

[B] As to testimony of physicians, see *Thompson v. Ish*, 99 Mo., 160; 17 Am. St. R., 552, note.

its production may expose him to a civil action,[1] or because he has a lien upon it.[2] [A]

[In all cases it is for the court and not the witness to judge of the lawfulness of the excuse for the non-production of the document called for, and it is the duty of the witness who has been served with a *subpœna duces tecum*, to bring the document with him into court. [B]

ARTICLE 119.

PRODUCTION OF DOCUMENTS [IN THE POSSESSION OF ATTORNEYS OR SOLICITORS.]

[No attorney or solicitor can be compelled to produce any documents intrusted to him as such by his clients, or to give oral evidence of their con-

[1] *Doe v. Date*, 3 Q. B., 609, 618.

[2] *Hope v. Liddell*, 7 De G. M. and G., 331; *Hunter v. Leathley*, 10 B. and C., 858; *Brassington v. Brassington*, 1 Si. and Stu., 455. It has been doubted whether production may not be refused on the ground of a lien as against the party requiring the production. This is suggested in *Brassington v. Brassington*, and was acted upon by Lord Denman in *Kemp v. King*, 2 Mo. and Ro., 437; but it seems to be opposed to *Hunter v. Leathley*, in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who had created the lien. See *Ley v. Barlow* (judgt. of Parke, B.), 1 Ex., 801.

[A] *Bull v. Loveland*, 10 Pick., 9, 14; *First Nat. Bank v. Hughes*, 6 Fed. Rep., 741.

[B] *Bull v. Loveland*, 10 Pick., 9, 14; 1 Whar. Ev., sec. 377. As to production of documents, see *Lester v. People*, 150 Ill., 408; 41 Am. St. R., 375, and note p. 388. Telegraphic messages in possession of company not privileged. *Ex parte*

tents, but he may be required to testify as to the existence of such documents, and whether they are in his possession, so as to enable the other party to give secondary evidence of their contents.] [A]

ARTICLE 120.

WITNESS NOT TO BE COMPELLED TO CRIMINATE HIMSELF.

No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness (or the wife or husband of the witness) to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for;[1] [B] but no one is excused from answering any

[1] *R. v. Boyes*, 1 B. and S., 330; followed and approved in *Ex parte Reynolds*, by the Court of Appeal; see L. R. 20 Ch. Div. 298. As to husbands and wives, see 1 Hale, P. C., 301; *R. v. Cliviger*, 2 T. R. 263; *Cartwright v. Green*, 8 Ve., 405; *R. v. Bathwick*, 2 B. and Ad., 639; *R. v. All Saints, Worcester*, 6 M. and S., 194. These cases show that even under the old law which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to criminate her husband. *R. v. Cliviger* assumes that she was, and was to that extent overruled. As to the latter law, see *R. v. Halliday*, Bell, 257. The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not.

Brown, 72 Mo., 83; 37 Am. R., 426; *Woods v. Miller*, 55 Iowa, 168; 39 Am. R , 170; but letters in U. S. mail are privileged. *Ex parte Jackson*, 96 U. S., 727.

[A] *Coveney v. Tannahill*, 1 Hill., 33; 37 Am. D., 287; *Rhoads v. Selin*, 4 Wash. C. C., 715, 718.

[B] *Fries v. Brugler*, 7 Halstead, 79; 21 Am. D., 52; *Calhoun v. Thompson*, 56 Ala., 166; 28 Am. R., 754; *Counselman v. Hitchcock*, 142 U. S., 547; *People v. Forbes*, 148 N. Y., 219.

question only because the answer may establish or tend to establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the [state] or of any other person.[1] [A]

[The privilege, however, may be waived by a witness voluntarily testifying to any matter which might expose him to a criminal prosecution, in which case he is bound to give all the details of the transaction if required. Parties to the cause testifying on their own offer are considered as thereby waiving their privilege as to the subject matter of their testimony in chief, and must submit to a full cross-examination thereon, notwithstanding the answers tend to criminate or disgrace them.] [B]

ARTICLE 121.

CORROBORATION, WHEN REQUIRED.

No order against any person alleged to be the father of a bastard child can be made by any jus-

[1] 46 Geo. III., c. 39. See *R. v. Scott*, 25 L. J. M. C., 128, and subsequent cases as to bankruptcy, and *ex parte Scholfield*, L. R., 6 Ch. Div., 230. *Quære*, is he bound to produce a document criminating himself? See *Webb v. East*, 5 Ex. D., 23 and 109.

[A] *Bull v. Loveland*, 10 Pick., 9, 12; *Taney v. Kemp*, 4 H. and J., 345; 7 Am. D., 673.

[B] *Foster v. Pierce*, 11 Cush., 437; 59 Am. D., 152; *Com. v. Nichols*, 114 Mass., 285; 19 Am. R., 346; *State v. White*, 19 Kans., 445; 27 Am. R., 137; *State v. Duncan*, 7 Wash., 366; 38 Am. St R., 888, and note, 895.

tices, or confirmed on appeal by any court, unless the evidence of the mother of the said bastard child is corroborated in some material particular to the satisfaction of the said justices or court respectively.[1] [A]

When the only proof against a person charged with a criminal offense is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.[2] [B]

[Courts will not grant divorces upon the testimony of the parties alone without some corroborative proof whenever the nature of the case admits of it. [C].

The general rule in equity is, that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill, but cases sometimes occur when the evidence arising from circumstances is of itself strong enough for this purpose.] [D]

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[1] 8 and 9 Vict., c. 10, s. 6; 35 and 36 Vict., c. 6, s. 4.
[2] 1 Ph. Ev., 93–101; T. E. ss. 887–91; 3 Russ. Cri., 600–611.

[A] 1 Whar. Ev., sec. 414.
[B] 1 Gr. Ev., sec. 380.
[C] *Robbins v. Robbins*, 100 Mass., 150.
[D] *Clarke's Exr. v. Van Riemsdyk*, 9 Cranch, 153, 160.

ARTICLE 122.

NUMBER OF WITNESSES.

[It is provided by article 3 section 3 of the Constitution of the United States that no person shall be convicted of treason against the United States, unless on the testimony of two witnesses to the same overt act, or on confession in open court. But a person may be convicted of treason against a state (where there is no express law to the contrary) by the testimony of two witnesses, one of them to one, and another to another overt act of the same treason, or both of them to a voluntary confession out of court.] [A]

If, upon a trial for perjury, the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.[1] [B]

[1] 3 Russ. on Crimes, 77–86.

[A] 1 Gr. Ev., sec. 255.

[B] 1 Gr. Ev., sec. 257; *U. S. v. Wood*, 14 Peters, 430, 440.

CHAPTER XVI.

OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION OF WITNESSES.

ARTICLE 123.

EVIDENCE TO BE UPON OATH, EXCEPT IN CERTAIN CASES.

All oral evidence given in any proceeding must be given upon oath, but if any person called as a witness refuses or is unwilling to be sworn from alleged conscientious motives, [he will be allowed to make a solemn religious affirmation involving a like appeal to God for the truth of his testimony in any mode which he shall declare to be binding on his conscience; and any person who, having made such affirmation, willfully and corruptly gives false evidence is punishable as for perjury.] [A]

ARTICLE 124.

FORM OF OATHS.

[All witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their

[A] 1 Gr. Ev., sec. 371; *Omichund v. Barker*, 1 Sm. Lea. Ca., 7 Am. ed., *535, *545; *Williamson v. Carroll*, 16 N. J. L., 217.

own consciences, and if the witness be not of the Christian religion, the court will inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form. In ascertaining what form of oath is binding upon the conscience of the witness, the court may inquire of the witness himself, and the proper time for making this inquiry is before he is sworn.] [A]

ARTICLE 125.

HOW ORAL EVIDENCE MAY BE TAKEN.

Oral evidence may be taken—

In open court according to the rules contained in this chapter relating to the examination of witnesses.

Or out of court for future use in court—

[(*a*) Under a commission in the manner prescribed by the terms of said commission, or by the rules of court or by the statute regulating the mode of executing the same.

(*b*) By deposition before any officer of the court or other person or persons appointed for that purpose, either by agreement of the parties or under the provisions of any statute or rule of court governing the tribunal in which said evidence is to be

[A] 1 Gr. Ev., sec. 371; 1 Whar. Ev., sec. 387; *Omichund v. Barker*, 1 Sm. Lea. Ca., 7 Am. ed., *535, *545; *The Merrimac*, 1 Ben., 490; *Fuller v. Fuller*, 17 Cal., 605, 612.

used; such depositions are to be taken only in the manner and under the circumstances prescribed, and to be used only for the purposes and upon the contingencies expressly provided by the terms of such agreement or statute or rule of court.]

[1] When a deposition or the return of a commission is used in any court as evidence of the matter stated therein, the party against whom it is read may object to the reading of anything therein contained on any ground upon which he might have objected to its being stated by a witness examined in open court, [A] provided that no one is entitled to object to the reading of any answer to any question asked by his own representative [excepting upon the ground of said answer being irresponsive to such question, [B] and provided, further, that no question may be objected to as leading unless exception was taken thereto before it was answered, in cases where the party objecting or his representative had the opportunity of so excepting.] [C]

[1] T. E., 491. *Hutchinson v. Bernard*, 2 Moo. and Rob., 1.

[A] *Scaggs v. B, & O. R. R.*, 10 Md., 268, 281.

[B] *Mayfield v. Kilgore*, 31 Md., 240, 243.

[C] *Strickler v. Todd*, 10 S. and R., 63, 73; 13 Am. D., 649; *Smith v. Cooke*, 31 Md., 174, 179; and see *York Co. v. R. R. Co.*, 3 Wall., 107, 113.

ARTICLE 126.*

EXAMINATION IN CHIEF, CROSS-EXAMINATION, AND RE-EXAMINATION.

Witnesses examined in open court must be first examined in chief, then cross-examined, and then re-examined.

Whenever any witness has been examined in chief, the opposite party has a right to cross-examine him. After the cross-examination is concluded, the party who called the witness has a right to re-examine him.

The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively.

If a witness dies, or becomes incapable of being further examined [before an opportunity for his cross-examination has been afforded to the party against whom his evidence is to be used, the testimony already given must be excluded.] [A]

If in the course of a trial a witness who was supposed to be competent appears to be incompetent,

* See Note XLV.

[A] *Kissam v. Forrest*, 25 Wend., 651; *People v. Cole*, 43 N. Y., 508; but see *Gass v. Stinson*, 3 Sumn., 98, 104–108.

his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it.[1] [A]

ARTICLE 127.

TO WHAT MATTERS CROSS-EXAMINATION AND RE-EXAMINATION MUST BE DIRECTED.

The examination [in chief] must relate to facts in issue or relevant or deemed to be relevant thereto, [and the cross-examination of a witness must be confined to the facts and circumstances connected with the matters stated in his direct examination (except as provided in article 129); if the party cross-examining desires his testimony as to other matters he must make the witness his own by calling him as such in the subsequent progress of the cause.] [B]

The re-examination must be directed to the explanation of matters referred to in cross-examina-

[1] *R. v. Whitehead*, L. R. 1 C. C. R., 33.

[A] *Evans v. Eaton*, 1 Peters C. C., 322, 338; *Mitchell v. Mitchell*, 11 G. and J., 388, 394.

[B] 1 Gr. Ev., sec. 445; *Phila. & Trenton R. R. v. Stimpson*, 14 Peters, 448, 461; *Houghton v. Jones*, 1 Wall., 702, 706. The rule as above stated prevails in most of the jurisdictions in this country, but this limitation of the range of cross-examination is not applied in several of the states, as Massachusetts, New York, Ohio, Alabama, Mississippi, Missouri, and Michigan. The cases are all collected in 1 Whar. Ev., sec. 529, note.

tion; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

ARTICLE 128.

LEADING QUESTIONS.

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in an examination in chief, or a re-examination, except with the permission of the court, [which may be given where the witness is evidently hostile to the party calling him, or reluctant to give evidence, or when omissions in his testimony are evidently caused by want of recollection which a suggestion may assist], but such questions may be asked in cross-examination. [A]

ARTICLE 129.*

QUESTIONS LAWFUL IN CROSS-EXAMINATION.

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

* See Note XLVI.

[A] 1 Gr. Ev., sec. 435; *Moody v. Rowell*, 17 Pick., 498; 28 Am. D., 317; *Turney v. State*, 8 Sm. and M., 104; 47 Am. D., 74, and note.

(1) To test his accuracy, veracity, or credibility; or

(2) To shake his credit, by injuring his character. [A]

Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not in the opinion of the court affect the credibility of the witness as the matter to which he is required to testify. [B]

In the case provided for in article 120, a witness cannot be compelled to answer such a question.

[A] 1 Gr. Ev., secs. 451 to 460 inclusive; 1 Whar. Ev., secs. 529 to 548 inclusive.

[B] There has been in this country considerable conflict as to whether, if objection be made, a witness can, on cross-examination, be asked if he has previously been convicted of any crime or misdemeanor, inasmuch as the best evidence of such conviction would be the record of the judgment; but the modern tendency is, if the question be given for the purpose of honestly discrediting a witness, to require an answer. Whar. Crim. Ev., sec. 474; *State v. Bacon*, 13 Oreg., 143; 57 Am. R., 8, and cases cited in note, p. 16. The general rule is that the discretion of the trial court in permitting or excluding questions which are relevant to the facts in issue, only so far as they tend to degrade and so discredit the witness, and in compelling answers to such questions, is absolute and not reviewable on appeal, except in cases of plain abuse and injus-

Illustrations.

(*a*) The question is, whether A committed perjury in swearing that he was R. T. B deposes that he made tattoo marks on the arm of R. T., which at the time of the trial were not and never had been on the arm of A. B may be asked and compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.[1]

[(*b*) Upon the trial of A for poisoning B, the wife of the latter, who had an illicit connection with A, being a witness for the state, may not be compelled to say on cross-examination whether she was in the habit of having sexual intercourse with other men than her husband before she had it with A.] [A]

ARTICLE 130.

EXCLUSION OF EVIDENCE TO CONTRADICT ANSWERS TO QUESTIONS TESTING VERACITY.

When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evi-

[1] *R. v. Orton.* See summing up of Cockburn, C. J., vol. ii, p. 719, etc.

tice: *Great West. Turnpike Co. v. Loomis*, 32 N. Y., 127; 88 Am. D., 311, and note, p. 321. But in criminal cases, when the accused is a witness and the judge permits questions to be put to him on cross-examination which have no bearing upon the charge for which he is being tried, and do not legitimately tend to impair his credibility, but may prejudice the minds of the jury against him, a judgment of conviction will be reversed on appeal. *People v. Crapo*, 76 N. Y., 288; 32 Am. R., 302.

[A] *Le Beau v. People*, 34 N. Y., 223, 230.

dence can be given to contradict him [A] except in the following cases:—[1]

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanor, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.[2] [B]

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.[3] [C]

ARTICLE 131.*

STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY MAY BE PROVED.

Every witness under cross-examination in any

* See Note XLVII.

[1] *A. G. v. Hitchcock*, 1 Ex., 91, 99–105. See, too, *Palmer v. Trower*, 8 Ex., 247.

[2] 28 and 29 Vict., c. 18, sec. 6.

[3] *A. G. v. Hitchcock*, 1 Ex., 91, pp. 100, 105.

[A] 1 Whar. Ev., sec. 559. The test of whether the denial of a fact inquired of in cross-examination may be contradicted is this, would the cross-examining party be entitled to prove such fact as part of his case, tending to establish his plea? See *Hildeburn v. Curran*, 65 Pa. St., 59, 63; *Combs v. Winchester*, 39 N. H., 13; 75 Am. D., 203.

[B] This exception, although founded upon an English statute, has been retained in this edition, because it has been provided in most of the states by statute that the previous conviction of crime may be proved to affect the credibility of any witness. See 1 Whar. Ev., secs. 397, 567; *ante*, Art. 129, note [B].

[C] *Newton v. Harris*, 6 N. Y., 345; *Byers v. Horner*, 47 Md., 23, 32.

proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it. [A]

[But the statements which it is intended to contradict must involve facts in evidence. If confined to opinion, when opinion is not in issue, or to other

[A] *Conrad v. Griffey*, 16 How., 38, 46; *Whiteford v. Burckmeyer*, 1 Gill., 127; 39 Am. D., 640.

In some of the states it is not necessary to ask the witness if he has made such contradictory statements before proving them; see *Tucker v. Welsh*, 17 Mass , 160, 166; 9 Am. D , 137; *Hedge v. Clapp*, 22 Conn., 262, 265; 58 Am. D., 424; *Robinson v. Hutchinson*, 31 Vt., 443, 449; *Cook v. Brown*, 34 N. H., 460, 471; *Ware v. Ware*, 8 Greenleaf, 42, 53; but in most jurisdictions the rule that the witness must be first asked about them is rigidly enforced, and the deposition of a witness, when offered in evidence, has not been suffered to be impeached by proof of any previous or subsequent contradictory statements, whether verbal or written, unless the witness had first been specially interrogated regarding them: *Conrad v. Griffey, supra;* see note to case of *Allen v. State*, 73 Am. D., p. 762.

Generally, however, this rule has been held not to extend to contradictory depositions of the same witness taken in the same cause, which may be introduced to impeach him, without calling his attention to them beforehand: *Eckert v. McAllister*, 45 Md., 290, 304; *Byran v. Walton*, 14 Ga., 185, 195; *Hughes v. Wilkinson*, 35 Ala., 453; but see *contra, Bradford v. Barclay*, 39 Ala., 33; *Samuels v. Griffith*, 13 Iowa. 103; *The Charles Morgan*, 115 U. S., 69, 77.

irrelevant matters, the cross-examining party is bound by the answer. [A]

A party examining a witness in chief, if taken by surprise by unexpected testimony, may interrogate him in respect to his own previous declarations inconsistent with his evidence, but may not contradict his answers in regard to having made such declarations.][1] [B]

ARTICLE 132.

CROSS EXAMINATION AS TO PREVIOUS STATEMENTS IN WRITING.

A witness under cross-examination (or a witness examined under the provisions of article 131, by the party who called him as to previous statements inconsistent with his present testimony) may [not] be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him [or its non-production satisfactorily accounted for, and notice being given him of the contents.] [C]

[1] *Rice v. Howard*, L. R. 16 Q. B. D., 681.

[A] *Holmes v. Anderson*, 18 Barb., 420; *Com. v. Mooney*, 110 Mass., 99, 101; 1 Gr. Ev., sec. 449; 1 Whar. Ev., sec. 551.

[B] *Bullard v. Pearsall*, 53 N. Y., 230; 1 Gr. Ev., secs. 444, 444*a*; *Cox v. Eayres*, 55 Vt, 24; 45 Am. R, 583; *Hickory v. U. States*, 151 U. S., 303, 8; but see *Smith v. Briscoe*, 65 Md., 561–8.

[C] *Gaffney v. People*, 50 N. Y., 416, 423; *Newcomb v. Griswold*, 24 N. Y, 298, 301; *Callahan v. Shaw*, 24 Iowa, 441; also, 1 Whar. Ev., sec. 68; 1 Gr. Ev., sec. 463, and 73 Am. D., note to *Allen v. State*, p. 770; but see *The Charles Morgan*, 115 U. S., p. 69, 77; *Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U. S., 507, 520.

ARTICLE 133.

IMPEACHING CREDIT OF WITNESS.

The credit of any witness may be impeached by the adverse party, by the evidence of persons who swear that they, from their knowledge of the witness['s general reputation for truth and veracity in the community in which he has lived], believe him to be unworthy of credit upon his oath. [A] Such persons may not, upon their examination in chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.[1] [B]

No such evidence may be given by the party by whom any witness is called; [C] but when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit,[2] [D] [and the credibility of the impeaching witness him-

[1] 2 Ph. Ev., 503-4; T. E., ss. 1324-5. [2] Ph. Ev., 504.

[A] *Tecse v. Huntingdon*, 23 How., 2, 11; *Knode v. Williamson*, 17 Wall., 586, 588; *Hamilton v. People*, 29 Mich., 173, 185; cited 1 Whar. Ev., sec. 565, note; *Blue v. Kibby*, 1 T. B. Mon., 195; 15 Am. D., 95, and note.

[B] *People v. Mather*, 4 Wend., 229; 21 Am. D., 122; *Weeks v. Hull*, 19 Conn., 376, 379; 50 Am. D., 249.

[C] *Bullard v. Pearsall*, 53 N. Y., 230; *Burkhalter v. Edwards*, 16 Ga., 593; 60 Am. D., 744; *Becker v. Koch*, 104 N. Y., 394; 58 Am. R., 515; *Dravo v. Fabel*, 132 U. S., 487.

[D] *Com. v. Ingraham*, 7 Gray, 46, 48; *People v. Davis*, 21 Wend., 309, 315.

self may be attacked and sustained in like manner. [A]

The record of the conviction of a witness of any crime may, by the laws of most of the states, be put in evidence to impeach his credibility, whether the witness has previously been interrogated about it or not.] [B]

ARTICLE 134.

OFFENSES AGAINST WOMEN.

When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offense was committed was of a generally immoral character, although she is not cross-examined on the subject.[1] The woman may, in such a case, be asked whether she has had connection with other men, but her answer cannot be contradicted.[2] She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she (probably) may be contradicted.[3] [C]

[1] *R. v. Clarke*, 2 Star., 241.

[2] *R. v. Holmes*, L. R. 1 C. C. R., 334.

[3] *R. v. Martin*, 6 C. and P., 562, and remarks in *R. v. Holmes*, p. 337, per Kelly, C. B. See also *R. v. Cockroft*, 11 Cox, 410; 41 L. J. M. C., 12, and *R. v. Riley*, 18 Q. B. D., 481.

[A] *Starks v. People*, 5 Denio, 106, 109; 1 Whar. Ev., sec. 568.

[B] See 1 Whar. Ev., secs. 567 and 397, and cases there cited.

[C] The American authorities on this point are very conflicting; in New York, Vermont, North Carolina, and other states the modern English rule, as stated in the text, prevails. See *People v. Jackson*, 3 Parker C. R., 391; while in Massachusetts, New Hampshire, Indiana, Missouri and Ohio, the

ARTICLE 135.

WHAT MATTERS MAY BE PROVED IN REFERENCE TO DECLARATIONS RELEVANT UNDER ARTICLES 25–32.

Whenever any declaration or statement made by a deceased person, relevant or deemed to be relevant under articles 25–32, both inclusive, is proved, all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness, and had denied, upon cross-examination, the truth of the matter suggested.[1] [A]

[1] *R. v. Drummond*, 1 Lea., 308; *R. v. Pike*, 3 C. and P., 598. In these cases dying declarations were excluded, because the persons by whom they were made would have been incompetent as witnesses, but the principle would obviously apply to all the cases in question.

evidence is confined to the general character of the woman, who cannot be interrogated about her intercourse with others than the defendant. In Michigan she may not only be questioned on the subject, but, if she denies it, the parties themselves may be put upon the stand to prove such intercourse with her, though circumstances tending to render it probable may not be testified to: *Strang v. People*, 24 Mich., 1, 6. In California, when the prosecutrix is the only witness to the act, her lewdness with third parties may be proved, whether she has been questioned on the subject or not: *People v. Benner*, 6 Cal., 221. See 2 Whar. Crim. Law, secs. 1151, 1152, where the cases are collected.

[A] As to dying declarations, see *Moore v. State*, 12 Ala., 764; 46 Am. D., 276; *People v. Laurence*, 21 Cal., 368; *Felder v. State*, 23 Tex. Ct. App., 477; 59 Am. R., 777. Although Sir James Stephen makes this article also applicable to deposi-

ARTICLE 136.

REFRESHING MEMORY.

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory. [A]

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.[1] [B]

[Such original writing may itself be put in evidence if the witness can testify positively to its accuracy. [C]

A witness may also refer to a copy of any such writing, if, after his memory has been refreshed by

[1] 2 Ph. Ev., 480, etc.; T. E., ss. 1264-70; R. N. P., 194-5.

tions, directly the contrary has been decided in *Conrad v. Griffey*, 16 How., 38, 46; *Hubbard v. Briggs*, 31 N. Y., 518, 536; *Runyan v. Price*, 15 Ohio State, 1, 11; 86 Am. D., 459.

[A] 1 Gr. Ev., secs. 436, 437, 438; *Dugan v. Mahoney*, 11 Allen, 572; *Maxwell v. Wilkinson*, 113 U. S., 656.

[B] *Weber v. Fickey*, 47 Md., 176.

[C] *Insurance Co. v. Weides*, 9 Wall., 677, 680; S. C. 14 Wall., 375, 380; *Ruch v. Rock Island*, 97 U. S., 693, 695; *Halsey v. Sinsburgh*, 15 N. Y., 485; 1 Gr. Ev., sec. 437, n. 3; 1 Whar. Ev., secs. 516, 519, 520.

it, he can swear to a distinct recollection of the transaction independently of the paper.] [A]

An expert may refresh his memory by reference to professional treatises.[1] [B]

ARTICLE 137.

RIGHT OF ADVERSE PARTY AS TO WRITING USED TO REFRESH MEMORY.

Any writing referred to under article 136 must be produced and shown to the adverse party if he requires it; and such party may, if he pleases, cross-examine the witness thereupon.[2] [C]

ARTICLE 138.

GIVING, AS EVIDENCE, DOCUMENT CALLED FOR AND PRODUCED ON NOTICE.

When a party calls for a document which he has given the other party notice to produce, and such

[1] *Sussex Peerage Case*, 11 C. and F., 114–17.

[2] See cases in R. N. P., 195.

[A] *Hill v. State*, 17 Wis., 675, 679; 86 Am. D., 736; *Markley* v. *Shutts*, 29 N. Y., 346, 351; *Bullock v. Hunter*, 44 Md., 416; 1 Gr. Ev., sec. 436; 2 Phil. Ev., 4 Am. ed., p. 923 (C. & H., note 587); 1 Sm. Lea. Cas., Am. note, p. *398.

[B] *Ripon v. Bittel*, 30 Wis., 614; *Harvey v. State*, 40 Ind., 516; *Pierson v. Hoag*, 47 Barb., 243, 246; 1 Whar. Ev., secs. 666 and 438.

[C] *State v. Bacon*, 41 Vt., 526; 98 Am. D., 616.

document is produced to, and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is or is deemed to be relevant.[1] [A]

ARTICLE 139.

USING, AS EVIDENCE, A DOCUMENT, PRODUCTION OF WHICH WAS REFUSED ON NOTICE.

When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party.[2] [B]

[1] *Wharam v. Routledge*, 1 Esp., 235; *Calvert v. Flower*, 7 C. and P., 386.

[2] *Doe v. Hodgson*, 12 A. and E., 135; but see remarks in 2 Ph. Ev., 270.

[A] *Whiteside v. Morrison*, 17 Md., 452; 79 Am. D., 661; *Clark v. Fletcher*, 1 Allen, 53, 57; *Jordon v. Wilkins*, 2 Wash. C. C., 482, 484, n; *Withers v. Gillespy*, 7 S. and R., 10, 14; but see *Austin v. Thompson*, 45 N. H., 113, 116.

[B] *Doon v. Donaher*, 113 Mass., 151.

CHAPTER XVII.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ARTICLE 140.

A new trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.[1] [A]

[A new trial will not be granted in any criminal case on the ground of the improper admission or rejection of evidence if, upon reviewing the whole case, the court to which the application is made be fully satisfied that the verdict rendered could not have been affected by the evidence improperly admitted or rejected.] [B]

[1] S. C. R., Order XXXIX, 6.

[A] *Lucas v. Brooks*, 18 Wall., 436, 454; *Johnson, Ex., v. Jennings, Adm.*, 10 Gratt., 1; 60 Am. D., 323, and cases cited in note 66 Am. D., p. 717–18; but see *contra* cases cited on p. 718–19, and also *Gilmer v. Higley*, 110 U. S., 47, 50.

[B] *People v. Gonzales*, 35 N. Y., 49, 59; *Com. v. Eberle*, 3 S. and R., 9, 14; *Lynes v. State*, 36 Miss., 617, 626; *Bird v. State*, 14 Ga., 43, 54; *De Phue v. State*, 44 Ala., 32, 40; *Clark v. People*, 31 Ills., 479, 481.

APPENDIX A.

FOURTH AND SEVENTEENTH SECTIONS OF THE STATUTE OF FRAUDS, 29 CAR. II., C. 3.

SECTION 4. "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate, or to charge the defendant upon any special promise, to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon any consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which said action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

SECTION 17. "No contract for the sale of any goods, wares and merchandises, for the price of ten pounds ($48.40) or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing, of the said bargain, be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

SIR JAMES F. STEPHEN'S

APPENDIX OF NOTES.

NOTE I.

(To ARTICLE 1.)

The definitions are simply explanations of the senses in which the words defined are used in this work. They will be found, however, if read in connection with my "Introduction to the Indian Evidence Act," to explain the manner in which it is arranged.

I use the word "presumption" in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof. Hence the few presumptions of law which I have thought it necessary to notice are the only ones I have to deal with.

In the earlier editions of this work I gave the following definition of relevancy:

Facts, whether in issue or not, are relevant to

each other when one is, or probably may be, or probably may have been—

the cause of the other;

the effect of the other;

an effect of the same cause;

a cause of the same effect;

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;

or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other;

provided that such facts do not fall within the exclusive rules contained in chapters iii, iv, v, vi, or that they do fall within the exceptions to those rules contained in those chapters.

This is taken (with some verbal alterations) from a pamphlet called "The Theory of Relevancy for the purpose of Judicial Evidence, by George Clifford Whitworth, Bombay Civil Service. Bombay, 1875."

The seventh section of the Indian evidence act is as follows: "Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afford an opportunity for their occurrence or transaction, are relevant."

The 11th section is as follows:

"Facts not otherwise relevant are relevant:

"(1) If they are inconsistent with any fact in issue or relevant fact;

"(2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact, highly probable or improbable."

In my "Introduction to the Indian Evidence Act" I examined at length the theory of judicial evidence, and tried to show that the theory of relevancy is only a particular case of the process of induction, and that it depends on the connection of events as cause and effect. This theory does not greatly differ from Bentham's, though he does not seem to me to have grasped it as distinctly as he probably would if he had lived to study Mr. Mill's Inductive Logic.

My theory was expressed too widely in certain parts, and not widely enough in others, and Mr. Whitworth's pamphlet appears to me to have corrected and completed it in a judicious manner. I accordingly embodied his definition of relevancy, with some variations and additions, in the text of the first edition. The necessity of limiting in some such way the terms of the 11th section of the Indian evidence act may be inferred from a judgment by Mr. Justice West (of the high court of Bombay), in the case of *R. v. Parb-*

hudas and others, printed in the "Law Journal," May 27, 1876. I have substituted the present definition for it, not because I think it wrong, but because I think it gives rather the principle on which the rule depends than a convenient practical rule.

As to the coincidence of this theory with English law, I can only say that it will be found to supply a key which will explain all that is said on the subject of circumstantial evidence by the writers who have treated of that subject. Mr. Whitworth goes through the evidence given against the German Müller, executed for murdering Mr. Briggs on the North London railway, and shows how each item of it can be referred to one or the other of the heads of relevancy which he discusses.

The theory of relevancy thus expressed would, I believe, suffice to solve every question which can arise upon the subject; but the legal rules based upon an unconscious apprehension of the theory exceed it at some points and fall short of it at others.

NOTE II.

(To ARTICLE 2.)

See 1 Ph. Ev., 493, etc.; Best, ss. 111 and 251; T. E., chap. ii, pt. ii.

For instances of relevant evidence held to be insufficient for the purpose for which it was ten-

dered on the ground of remoteness, see *R. v.* ——, 2 C. and P., 459; and *Mann v. Langton*, 3 A. and E., 699.

Mr. Taylor (s. 867) adopts from Professor Greenleaf the statement that "the law excludes on public grounds . . . evidence which is indecent or offensive to public morals, or injurious to the feelings of third persons." The authorities given for this are actions on wagers which the court refused to try, or in which they arrested judgment, because the wagers were in themselves impertinent and offensive, as, for instance, a wager as to the sex of the Chevalier D'Eon (*Da Costa v. Jones*, Cowp., 729). No action now lies upon a wager, and I fear that there is no authority for the proposition advanced by Professor Greenleaf. I know of no case in which a fact in issue or relevant to an issue which the court is bound to try can be excluded merely because it would pain some one who is a stranger to the action. Indeed, in *Da Costa v. Jones*, Lord Mansfield said expressly, "Indecency of evidence is no objection to its being received where it is necessary to the decision of a civil or criminal right;" (p. 734.) (See article 129, and note xlvii.)

NOTE III.

(To ARTICLE 4.)

On this subject see also 1 Ph. Ev., 157–164; T. E., ss. 527–532; Best, s. 508; 3 Russ. on Crimes, by

Greaves, 161–7. (See, too, *The Queen's Case*, 2 Br. and Bing., 309–10.)

The principle is substantially the same as that of principal and accessory, or principal and agent. When various persons conspire to commit an offense each makes the rest his agents to carry the plan into execution. (See, too, article 17, note xii.)

NOTE IV.

(TO ARTICLE 5.)

The principle is fully explained and illustrated in *Malcolmson v. O'Dea*, 10 H. L. C., 593. See particularly the reply to the questions put by the House of Lords to the Judges, delivered by Willes, J., 611–22.

See also 1 Ph. Ev., 234–9; T. E., ss. 593–601; Best, s. 499.

Mr. Phillips and Mr. Taylor treat this principle as an exception to the rule excluding hearsay. They regard the statements contained in the title-deeds as written statements made by persons not called as witnesses. I think the deeds must be regarded as constituting the transactions which they effect; and in the case supposed in the text, those transactions are actually in issue. When it is asserted that land belongs to A, what is meant is, that A is entitled to it by a series of transactions of which his title-deeds are by law the exclusive evi-

dence (see article 40). The existence of the deeds is thus the very fact which is to be proved.

Mr. Best treats the case as one of "derivative evidence," an expression which does not appear to me felicitous.

NOTE V.

(To ARTICLE 8.)

The items of evidence included in this article are often referred to by the phrase "res gestæ," which seems to have come into use on account of its convenient obscurity. The doctrine of "res gestæ" was much discussed in the case of *Doe v. Tatham* (p. 79, etc.) In the course of the argument, Bosanquet, J., observed, "How do you translate res gestæ? gestæ, by whom?" Parke, B., afterwards observed, "The acts by whomsoever done are res gestæ, if relevant to the matter in issue. But the question is, what are relevant?" (7 A. and E., 353.) In delivering his opinion to the House of Lords, the same judge laid down the rule thus: "Where any facts are proper evidence upon an issue [*i. e.*, when they are in issue, or relevant to the issue] all oral or written declarations which can explain such facts may be received in evidence." (Same Case, 4 Bing., N. C., 548.) The question asked by Baron Parke goes to the root of the whole subject, and I have tried to answer it at length in the text, and to give it the prominence in the statement of the law which its importance deserves.

Besides the cases cited in the illustrations, see cases as to statements accompanying acts collected in 1 Ph. Ev., 152–7, and T. E., ss. 521, 528. I have stated, in accordance with *R. v. Walker*, 2 M. and R., 212, that the particulars of a complaint are not admissible; but I have heard Willes, J., rule that they were on several occasions, vouching Parke, B., as his authority. *R. v. Walker* was decided by Parke, B., in 1839. Though he excluded the statement, he said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination."

Lord Bramwell was in the habit, during the latter part of his judicial career, of admitting the complaint itself. The practice is certainly in accordance with common sense.

NOTE VI.

(To ARTICLES 10, 11, 12.)

Article 10 is equivalent to the maxim, "Res inter alios acta alteri nocere non debet," which is explained and commented on in Best, ss. 506–510 (though I should scarcely adopt his explanation of it), and

by Broom ("Maxims," 954–968). The application of the maxim to the Law of Evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it stated in articles 11 and 12, which show that it means, You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

The exceptions to the rule given in articles 11 and 12 are generalized from the cases referred to in the illustrations. It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application than the exceptions. It is indeed one of the most characteristic and distinctive parts of the English law of evidence, for this is the rule which prevents a man charged with a particular offense from having either to submit to imputations which in many cases would be fatal to

him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. A statement of the law of evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one would neither represent the existing law fairly nor in my judgment improve it.

The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime. In each of the cases by which article 12 is illustrated, the evidence admitted went to prove the true character of facts which, standing alone, might naturally have been accounted for on the supposition of accident—a supposition which was rebutted by the repetition of similar occurrences. In the case of *R. v. Gray* (Illustration *a*), there were many other circumstances which would have been sufficient to prove the prisoner's guilt, apart from the previous fires. That part of the evidence, indeed, seemed to have little influence on the jury. *Garner's Case* (Illustration *c*, note) was an extraordinary one, and its result was in every way unsatisfactory. Some account of this case will be found in the evidence given by me before the Commission on Capital Punishments which sat in 1866.

NOTE VII.

(To ARTICLE 13.)

As to presumptions arising from the course of office or business, see Best, s. 403; 1 Ph. Ev., 480–4; T. E., s. 147. The presumption, "Omnia esse rite acta," also applies. See Broom's "Maxims," 942; Best, ss. 353–365; T. E., s. 124, etc.; 1 Ph. Ev., 480; and Star., 757, 763.

NOTE VIII.

(To ARTICLE 14.)

The unsatisfactory character of the definitions usually given of hearsay is well known. See Best, s. 495; T. E., ss. 507–510. The definition given by Mr. Phillips sufficiently exemplifies it: "When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, *states the language of others which he has heard*, or produces papers which he identifies as being written by particular individuals, he offers what is called hearsay evidence. This matter may sometimes be the very matter in dispute," etc. (1 Ph. Ev., 143.) If this definition is correct, the maxim, "Hearsay is no evidence," can only be saved from the charge of falsehood by ex-

ceptions which make nonsense of it. By attaching to it the meaning given in the text, it becomes both intelligible and true. There is no real difference between the fact that a man was heard to say this or that, and any other fact. Words spoken may convey a threat, supply the motive for a crime, constitute a contract, amount to slander, etc., etc.; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of some one who heard them. The important point to remember about them is that bare assertion must not, generally speaking, be regarded as relevant to the truth of the matter asserted.

The doctrine of hearsay evidence was fully discussed by many of the judges in the case of *Doe d. Wright v. Tatham*, on the different occasions when that case came before the court (see 7 A. and E., 313–408; 4 Bing. N. C., 489–573). The question was, whether letters addressed to a deceased testator, implying that the writers thought him sane, but not acted upon by him, could be regarded as relevant to his sanity, which was the point in issue. The case sets the stringency of the rule against hearsay in a light which is forcibly illustrated by a passage in the judgment of Baron Parke (7 A. and E., 385–8), to the following effect: He treats the letters as "statements of the writers, not on oath, of the truth of the matter in question, with this addition, that they have acted upon the statements

on the faith of their being true, by their sending he letters to the testator." He then goes through a variety of illustrations which had been suggested n argument, and shows that in no case ought such tatements to be regarded as relevant to the truth of the matter stated, even when the circumstances were such as to give the strongest possible guarantee that such statements expressed the honest opinions of the persons who made them. Amongst others he mentions the following: "The conduct of the family or relations of a testator taking the ame precautions in his absence as if he were lunatic—his election in his absence to some high and esponsible office; the conduct of a physician who ermitted a will to be executed by a sick testator; he conduct of a deceased captain on a question of eaworthiness, who, after examining every part of vessel, embarked in it with his family; all these, hen deliberately considered, are, with reference to he matter in issue in each case, mere instances of earsay evidence—mere statements, not on oath, ut implied in or vouched by the actual conduct of ersons by whose acts the litigant parties are not to e bound." All these matters are therefore to be reated as irrelevant to the questions at issue.

These observations make the rule quite distinct, ut the reason suggested for it in the concluding ords of the passage extracted appears to be weak. hat passage implies that hearsay is excluded be-

cause no one "ought to be bound by the act of a stranger." That no one shall have power to make a contract for another or commit a crime for which that other is to be responsible without his authority is obviously reasonable, but it is not so plain why A's conduct should not furnish good grounds for inference as to B's conduct, though it was not authorized by B. The importance of shortening proceedings, the importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud, are considerations which probably justify the rule excluding hearsay; but Baron Parke's illustrations of its operation clearly prove that in some cases it excludes the proof of matter which, but for it, would be regarded not only as relevant to particular facts, but as good grounds for believing in their existence.

NOTE IX.

(To ARTICLE 15.)

This definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence; but they appear to me to belong to other departments of the law. The subject, including the matter which I omit, is treated

at length in 1 Ph. Ev., 308–401, and T. E., ss. 653–788. A vast variety of cases upon admissions of every sort may be found by referring to Roscoe N. P. (Index, under the word *Admissions.*) It may, perhaps, be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of documents, discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the judge or jury may of course attach degrees of credit to different parts of the matter proved. This rule is elaborately discussed and illustrated by Mr. Taylor, ss. 655–665. It has lost much of the importance which attached to it when parties to actions could not be witnesses, but could be compelled to make admissions by bills of discovery. The ingenuity of equity draughtsmen was under that system greatly exercised in drawing answers in such a form that it was impossible to read part of them without reading the whole, and the ingenuity of the court was at least as much exercised in countermining their ingenious devices. The power of administering interrogatories, and of examining the parties directly, has made great changes in these matters.

NOTE X.

(TO ARTICLE 16.)

As to admissions by parties, see *Moriarty v. L. C. & D. Railway*, L. R. 5 Q. B., 320, per Blackburn, J.; *Alner v. George*, 1 Camp., 392; *Bauerman v. Radenius*, 7 T. R., 663.

As to admissions by parties interested, see *Spargo v. Brown*, 9 B. and C., 938.

See, also, on the subject of this article, 1 Ph. Ev., 362–3, 369, 398; and T. E., ss. 669–671, 685, 687, 719; Roscoe N. P., 71.

As to admissions by privies, see 1 Ph. Ev., 394–7, and T. E. (from Greenleaf), s. 712.

NOTE XI.

(TO ARTICLE 17.)

The subject of the relevancy of admissions by agents is rendered difficult by the vast variety of forms which agency assumes, and by the distinction between an agent for the purpose of making a statement and an agent for the purpose of transacting business. If A sends a message by B, B's words in delivering it are in effect A's; but B's statements in relation to the subject matter of the message have, as such, no special value. A's own statements are valuable if they suggest an inference which he afterwards contests because they are

against his interest; but when the agent's duty is done, he has no special interest in the matter.

The principle as to admissions by agents is stated and explained by Sir W. Grant in *Fairlie v. Hastings*, 10 Ve., 126–7.

NOTE XII.

(To ARTICLE 18.)

See, for a third exception (which could hardly occur now), *Clay v. Langslow*, M. and M., 45.

NOTE XIII.

(To ARTICLE 19.)

This comes very near to the case of arbitration. See, as to irregular arbitrations of this kind, 1 Ph. Ev., 383; T. E., ss. 689–90.

NOTE XIV.

(To ARTICLE 20.)

See more on this subject in 1 Ph. Ev., 326–8; T. E., ss. 702, 720–3; R. N. P., 66.

NOTE XV.

(To ARTICLE 22.)

On the law as to confessions, see 1 Ph. Ev., 401–423; T. E., ss. 796–807, and s. 824; Best, ss. 551–574; Roscoe Cr. Ev., 38–56; 3 Russ. on

Crimes, by Greaves, 365–436. Joy on Confessions reduces the law on the subject to the shape of thirteen propositions, the effect of all of which is given in the text in a different form.

Many cases have been decided as to the language which amounts to an inducement to confess (see Roscoe Cr. Ev., 40–3, where most of them are collected). They are, however, for practical purposes, summed up in *R. v. Baldry*, 2 Den., 430, which is the authority for the last lines of the first paragraph of this article.

NOTE XVI.

(To ARTICLE 23.)

Cases are sometimes cited to show that if a person is examined as a witness on oath, his deposition cannot be used in evidence against him afterwards (see T. E., ss. 809 and 818, n. 6; also 3 Russ. on Cri. by Greaves, 407, etc.) All these cases, however, relate to the examinations before magistrates of persons accused of crimes, under the statutes which were in force before 11 and 12 Vict., c. 42.

These statutes authorized the examination of prisoners, but not their examination upon oath. The 11 and 12 Vict., c. 42, prescribes the form of the only question which the magistrate can put to a prisoner; and since that enactment it is scarcely possible to suppose that any magistrate would put a

prisoner upon his oath. The cases may, therefore, be regarded as obsolete.

NOTE XVII.

(To ARTICLE 26.)

As to dying declarations, see 1 Ph. Ev., 239–252; T. E., ss. 644–652; Best, s. 505; Starkie, 32 and 38; 3 Russ. Cri., 250–272 (perhaps the fullest collection of the cases on the subject); Roscoe Crim. Ev., 31–2. *R. v. Baker*, 2 Mo. and Ro., 53, is a curious case on this subject. A and B were both poisoned by eating the same cake. C was tried for poisoning A. B's dying declaration that she made the cake in C's presence, and put nothing bad in it, was admitted as against C, on the ground that the whole formed one transaction.

NOTE XVIII.

(To ARTICLE 27.)

1 Ph. Ev., 280–300; T. E., ss. 630–643; Best, 501; R. N. P., 63; and see note to *Price v. Lord Torrington*, 2 S. L. C., 328. The last case on the subject is *Massey v. Allen*, L. R., 13 Ch. Div., 558.

NOTE XIX.

(To ARTICLE 28.)

The best statement of the law upon this subject will be found in *Higham v. Ridgway*, and the note

thereto, 2 S. L. C., 318. See also 1 Ph. Ev., 252–280; T. E., ss. 602–629; Best, s. 500; R. N. P., 584.

A class of cases exists which I have not put into the form of an article, partly because their occurrence since the commutation of tithes must be very rare, and partly because I find a great difficulty in understanding the place which the rule established by them ought to occupy in a systematic statement of the law. They are cases which lay down the rule that statements as to the receipts of tithes and moduses made by deceased rectors and other ecclesiastical corporations sole are admissible in favor of their successors. There is no doubt as to the rule (see, in particular, *Short v. Lee*, 2 Jac. and Wal., 464; and *Young v. Clare Hall*, 17 Q. B., 537). The difficulty is to see why it was ever regarded as an exception. It falls directly within the principle stated in the text, and would appear to be an obvious illustration of it; but in many cases it has been declared to be anomalous, inasmuch as it enables a predecessor in title to make evidence in favor of his successor. This suggests that article 28 ought to be limited by a proviso that a declaration against interest is not relevant if it was made by a predecessor in title of the person who seeks to prove it, unless it is a declaration by an ecclesiastical corporation sole, or a member of an ecclesiastical corporation aggregate (see *Short v. Lee*), as to the receipt of a tithe or modus.

Some countenance for such a proviso may be found in the terms in which Bayley, J., states the rule in *Gleadow v. Atkin*, and in the circumstance that when it first obtained currency the parties to an action were not competent witnesses. But the rule as to the endorsement of notes, bonds, etc., is distinctly opposed to such a view.

NOTE XX.

(To ARTICLE 30.)

Upon this subject, besides the authorities in the text, see 1 Ph. Ev., 169–197; T. E., ss. 543–569: Best, s. 497; R. N. P., 50–54 (the latest collection of cases).

A great number of cases have been decided as to the particular documents, etc., which fall within the rule given in the text. They are collected in the works referred to above, but they appear to me merely to illustrate one or other of the branches of the rule, and not to extend or vary it. An award, *e. g.*, is not within the last branch of illustration (*b*), because it "is but the opinion of the arbitrator, not upon his own knowledge" (*Evans v. Rees*, 10 A. and E., 155); but the detailed application of such a rule as this is better learned by experience, applied to a firm grasp of principle, than by an attempt to recollect innumerable cases.

The case of *Weeks v. Sparke* is remarkable for

the light it throws on the history of the law of evidence. It was decided in 1813, and contains *inter alia* the following curious remarks by Lord Ellenborough: "It is stated to be the habit and practice of different circuits to admit this species of evidence upon such a question as the present. That certainly cannot make the law, but it shows at least, from the established practice of a large branch of the profession, and of the judges who have presided at various times on those circuits, what has been the prevailing opinion upon this subject amongst so large a class of persons interested in the due administration of the law. It is stated to have been the practice both of the northern and western circuits. My learned predecessor, Lord Kenyon, certainly held a different opinion, the practice of the Oxford circuit, of which he was a member, being different." So in the *Berkeley Peerage Case*, Lord Eldon said, "when it was proposed to read this deposition as a declaration, the attorney-general (Sir Vicary Gibbs) flatly objected to it. *He spoke quite right as a Western Circuiteer*, of what he had often heard laid down in the West, and never heard doubted" (4 Cam. 419, A. D. 1811). This shows how very modern much of the law of evidence is. Le Blanc, J., in *Weeks v. Sparke*, says, that a foundation must be laid for evidence of this sort "by acts of enjoyment within living memory." This seems superfluous, as no jury would ever find that a public right of

way existed, which had not been used in living memory, on the strength of a report that some deceased person had said that there once was such a right.

NOTE XXI.

(To ARTICLE 31.)

See 1 Ph. Ev., 197–233; T. E., ss. 571–592; Best, 633; R. N. P., 49–50.

The *Berkeley Peerage Case* (Answers of the Judges to the House of Lords), 4 Cam., 401, which established the third condition given in the text; and *Davies v. Lowndes*, 6 M. and G., 471 (see more particularly pp. 525–9, in which the question of family pedigrees is fully discussed), are specially important on this subject.

As to declarations as to the place of births, etc., see *Shields v. Boucher*, 1 De G. and S., 49–58.

NOTE XXII.

(To ARTICLE 32.)

See, also, 1 Ph. Ev., 306–8; T. E., ss 434–447; Buller N. P., 238, and following.

In reference to this subject it has been asked whether this principle applies indiscriminately to all kinds of evidence in all cases. Suppose a man were to be tried twice upon the same facts—e. g., for robbery after an acquittal for murder, and sup-

pose that in the interval between the two trials an important witness who had not been called before the magistrates were to die, might his evidence be read on the second trial from a reporter's short-hand notes? This case might easily have occurred if Orton had been put on his trial for forgery as well as for perjury. I should be disposed to think, on principle, that such evidence would be admissible, though I cannot cite any authority on the subject. The common law principle on which depositions taken before magistrates and in chancery proceedings were admitted seems to cover the case.

NOTE XXIII.

(To ARTICLES 39–47.)

The law relating to the relevancy of judgments of courts of justice to the existence of the matters which they assert is made to appear extremely complicated by the manner in which it is usually dealt with. The method commonly employed is to mix up the question of the effect of judgments of various kinds with that of their admissibility, subjects which appear to belong to different branches of the law.

Thus the subject, as commonly treated, introduces into the law of evidence an attempt to distinguish between judgments *in rem*, and judgments *in personam* or *inter partes* (terms adapted from,

but not belonging to, Roman law, and never clearly defined in reference to our own or any other system); also the question of the effect of the pleas of *autrefois acquit*, and *autrefois convict*, which clearly belong not to evidence, but to criminal procedure; the question of estoppels, which belongs rather to the law of pleading than to that of evidence; and the question of the effect given to the judgments of foreign courts of justice, which would seem more properly to belong to private international law. These and other matters are treated of at great length in 2 Ph. Ev., 1–78, and T. E., ss. 1480–1534, and in the note to the *Duchess of Kingston's Case*, in 2 S. L. C., 777–880. Best (ss. 588–595) treats the matter more concisely.

The text is confined to as complete a statement as I could make of the principles which regulate the relevancy of judgments considered as declarations proving the facts which they assert, whatever may be the effect or the use to be made of those facts when proved. Thus the leading principle stated in article forty is equally true of all judgments alike. Every judgment, whether it be *in rem* or *inter partes*, must and does prove what it actually effects, though the effects of different sorts of judgments differ as widely as the effects of different sorts of deeds.

There has been much controversy as to the extent to which effect ought to be given to the judg-

ments of foreign courts in this country, and as to the cases in which the courts will refuse to act upon them; but, as a mere question of evidence, they do not differ from English judgments. The cases on foreign judgments are collected in the note to the *Duchess of Kingston's Case*, 2 S. L. C., 813–845. There is a convenient list of the cases in R. N. P., 201–3. The cases of *Godard v. Gray*, L. R. 6 Q. B., 139, and *Castrique v. Imrie*, L. R. 4 E. and I. A., 414, are the latest leading cases on the subject.

NOTE XXIV.

(To CHAPTER V.)

On evidence of opinions, see 1 Ph. Ev., 520–8; T. E., ss. 1273–1281; Best, ss. 511–17; R. N. P., 193–4. The leading case on the subject is *Doe v. Tatham*, 7 A. and E., 313; and 4 Bing. N. C., 489, referred to above in note ix. Baron Parke, in the extracts there given, treats an expression of opinion as hearsay—that is, as a statement affirming the truth of the subject matter of the opinion.

NOTE XXV.

(To CHAPTER VI.)

See 1 Ph., 502–8; T. E., ss. 325–336; Best, ss. 257–263; 3 Russ. Cr., 299–304. The subject is considered at length in *R. v. Rowton*, 1 L. and C., 520. One consequence of the view of the subject

taken in that case is that a witness may, with perfect truth, swear that a man who, to his knowledge, has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbors. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R. v. Rowton*, the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.

NOTE XXVI.

(To ARTICLE 58.)

[Omitted, this article being entirely rewritten.]

NOTE XXVII.

(To ARTICLE 62.)

Owing to the ambiguity of the word "evidence," which is sometimes used to signify the effect of a fact when proved, and sometimes to signify the testimony by which a fact is proved, the expression "hearsay is no evidence" has many meanings. Its

common and most important meaning is the one given in article 14, which might be otherwise expressed by saying that the connection between events, and reports that have happened, is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the occurrence of the events, except in excepted cases. Article 62 expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved under article 31 that A, who died fifty years ago, said that he had heard from his father B, who died 100 years ago, that A's grandfather C had told B that D, C's elder brother, died without issue, A's statement must be proved by some one who, with his own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way. Cases in which evidence is given of character and general opinion may perhaps seem to be exceptions to this rule, but they are not so. When a man swears that another has a good character, he means that he has heard many people, though he does not particularly recollect what people, speak well of him, though he does not recollect all that they said.

NOTE XXVIII.

(To ARTICLES 66 AND 67.)

This is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. The following characteristic observations by Lord Ellenborough occur in *R. v. Harringworth*, 4 M. and S., 353:

"The rule, therefore, is universal that you must first call the subscribing witness, and it is not to be varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no better than any other man that is without them*, if by mere force of speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal and universal as any that can be stated in a court of justice."

In *Whyman v. Garth*, 8 Ex., 807, Pollock, C. B., said, "The parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his [the attesting witness] being called to depose to the circumstances attending its execution."

In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury. See as to this, Bracton, fo. 38*a*; Fortescue *de Laudibus*, ch. xxxii, with Selden's note, and cases collected from the Year-books in Broke's Abridgment, tit. *Testmoignes.*

For the present rule, and the exceptions to it, see 1 Ph. Ev., 242–261; T. E., ss. 1637–42; R. N. P., 147–50; Best, ss. 220, etc.

The old rule which applied to all attested documents was restricted to those required to be attested by law, by 17 and 18 Vict., c. 125, s. 26, and 28 and 29 Vict., c. 18, ss. 1 and 7.

NOTE XXIX.

(To ARTICLE 72.)

For these rules in greater detail, see 1 Ph. Ev., 452–3, and 2 Ph. Ev., 272–289; T. E., ss. 419–426; R. N. P., 8 and 9.

The principle of all the rules is fully explained in the cases cited in the foot-notes, more particularly in *Dwyer v. Collins*, 7 Ex., 639. In that case it is held that the object of notice to produce is "to enable the party to have the document in court, and if he does not, to enable his opponent to give

parol evidence . . . to exclude the argument that the opponent has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence" (pp. 647–8.)

NOTE XXX.

(To ARTICLE 75.)

Mr. Phillips (ii, 196) says, that upon a plea of nul tiel record, the original record must be produced if it is in the same court.

Mr. Taylor (s. 1379) says, that upon prosecutions for perjury assigned upon any judicial document the original must be produced. The authorities given seem to me hardly to bear out either of these statements. They show that the production of the original in such cases is the usual course, but not, I think, that it is necessary. The case of *Lady Dartmouth v. Roberts*, 16 Ea., 334, is too wide for the proposition for which it is cited. The matter, however, is of little practical importance.

NOTE XXXI.

(To ARTICLES 77 AND 78.)

The learning as to exemplifications and office-copies will be found in the following authorities: Gilbert's Law of Evidence, 11–20; Buller, Nisi

Prius, 228, and following: Starkie, 256–66 (fully and very conveniently); 2 Ph. Ev., 196–200; T. E., ss. 1380–4; R. N. P., 112–15. The second paragraph of article 77 is founded on *Appleton v. Braybrook*, 6 M. and S., 39.

As to exemplifications not under the great seal, it is remarkable that the judicature acts give no seal to the Supreme Court, or the high court, or any of its divisions.

NOTE XXXII.

(To ARTICLE 90.)

The distinction between this and the following article is, that article 90 defines the cases in which documents are exclusive evidence of the transactions which they embody, while article 91 deals with the interpretation of documents by oral evidence. The two subjects are so closely connected together, that they are not usually treated as distinct; but they are so in fact. A and B make a contract of marine insurance on goods, and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to be given of the exceptions as to the

particular ship. It does permit oral evidence to be given to annex the condition, and thus far it decides that for one purpose the document shall, and that for another it shall not, be regarded as exclusive evidence of the terms of the actual agreement between the parties. It also allows the technical term to be explained, and in doing so it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad faith or bad memory, for which reason a writing is presumed as a general rule to embody the final and considered determination of the parties to it. The second depends on the consideration of the imperfections of language, and of the inadequate manner in which people adjust their words to the facts to which they apply.

The rules themselves are not, I think, difficult either to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence the exposition of these rules, and the abridgment of all the illustrations of them which have occurred in practice, occupy a very large space in the different text writers. They will be found in 2 Ph. Ev., 332–424; T. E., ss. 1031–

1110; Star., 648–731; Best (very shortly and imperfectly), ss. 226–229; R. N. P. (an immense list of cases), 17–35.

As to paragraph (4), which is founded on the case of *Goss v. Lord Nugent*, it is to be observed that the paragraph is purposely so drawn as not to touch the question of the effect of the statute of frauds. It was held in effect in *Goss v. Lord Nugent* that if by reason of the statute of frauds the substituted contract could not be enforced, it would not have the effect of waiving part of the original contract; but it seems the better opinion that a verbal rescission of a contract good under the statute of frauds would be good. See *Noble v. Ward*, L. R., 2 Ex., 135, and Pollock on Contracts, 411, note (6). A contract by deed can be released only by deed, and this case also would fall within the proviso to paragraph (4).

The cases given in the illustrations will be found to mark sufficiently the various rules stated. As to paragraph (5) a very large collection of cases will be found in the notes to *Wigglesworth v. Dallison*, 1 S. L. C., 598–628, but the consideration of them appears to belong rather to mercantile law than to the law of evidence. For instance, the question what stipulations are consistent with, and what are contradictory to, the contract formed by subscribing a bill of exchange, or the contract between an insurer

and an underwriter, are not questions of the law of evidence.

NOTE XXXIII.

(To ARTICLE 91.)

Perhaps the subject matter of this article does not fall strictly within the law of evidence, but it is generally considered to do so; and as it has always been treated as a branch of the subject, I have thought it best to deal with it.

The general authorities for the propositions in the text are the same as those specified in the last note; but the great authority on the subject is the work of Vice-Chancellor Wigram on Extrinsic Evidence. Article 91, indeed, will be found, on examination, to differ from the six propositions of Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills. It will, I think, be found, on examination, that every case cited by the Vice-Chancellor might be used as an illustration of one or the other of the propositions contained in it.

It is difficult to justify the line drawn between the rule as to cases in which evidence of expressions of intention is admitted and cases in which it is rejected (paragraph 7, illustrations (*k*), (*l*), and paragraph (8), illustration (*m*). When placed side by side, such cases as *Doe v. Hiscocks* (illustration *k*) and *Doe v. Needs* (illustration *m*) produce a

singular effect. The vagueness of the distinction between them is indicated by the case of *Charter v. Charter*, L. R. 2 P. and D., 315. In this case the testator Forster Charter appointed "my son Forster Charter" his executor. He had two sons, William Forster Charter and Charles Charter, and many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case, but expressed an opinion (p. 319) that, if it were necessary, evidence of declarations of intention might be admitted under the rule laid down by Lord Abinger in *Hiscocks v. Hiscocks*, because part of the language employed ("my son —— Charter") applied correctly to each son, and the remainder, "Forster," to neither. This mode of construing the rule would admit evidence of declarations of intention both in cases falling under paragraph 8, and in cases falling under paragraph 7, which is inconsistent not only with the reasoning in the judgment, but with the actual decision in *Doe v. Hiscocks*. It is also inconsistent with the principles of the judgment in the later case of *Allgood v. Blake*, L. R. 8 Ex., 160, where the rule is stated by Blackburn, J., as follows: "In construing a will, the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference

to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words." After quoting Wigram on Extrinsic Evidence, and *Doe v. Hiscocks*, he adds: "No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean." The part of Lord Penzance's judgment above referred to was unanimously overruled in the House of Lords; though the court, being equally divided as to the construction of the will, refused to reverse the judgment, and the principle "*præsumitur pro negante.*"

Conclusive as the authorities upon the subject are, it may not, perhaps, be presumptuous to express a doubt whether the conflict between a natural wish to fulfill the intention which the testator would have

formed if he had recollected all the circumstances of the case; the wish to avoid the evil of permitting written instruments to be varied by oral evidence; and the wish to give effect to wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7, and in cases falling under paragraph 8, or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts. Such a decision as that in *Stringer v. Gardiner*, the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his will, appears to me to be a practical refutation of the principle or rule on which it is based.

Of course every document, whatever, must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist, and therefore in every case whatever, every fact must be allowed to be proved to which the document does, or probably may, refer; but if more evidence than this is admitted, if the court may look at circumstances which affect the probability that the testator would form this inten-

tion or that, why should declarations of intention be excluded? If the question is, "What did the testator say?" why should the court look at the circumstances that he lived with Charles, and was on bad terms with William? How can any amount of evidence to show that the testator intended to write "Charles" show that what he did write means "Charles?" To say that "Forster" means "Charles," is like saying that "two" means "three." If the question is, "What did the testator wish?" why should the court refuse to look at his declarations of intention? And what third question can be asked? The only one which can be suggested is, "What would the testator have meant if he had deliberately used unmeaning words?" The only answer to this would be, he would have had no meaning, and would have said nothing, and his bequest should be *pro tanto* void.

NOTE XXXIV.

(To ARTICLE 92.)

See 2 Ph. Ev., 364; Star., 726; T. E. (from Greenleaf), s. 1051. Various cases are quoted by these writers in support of the first part of the proposition in the article; but *R. v. Cheadle* is the only one which appears to me to come quite up to it. They are all settlement cases.

NOTE XXXV.

(To CHAPTER XIII.)

In this and the following chapter many matters usually introduced into treatises on evidence are omitted, because they appear to belong either to the subject of pleading, or to different branches of substantive law. For instance, the rules as to the burden of proof of negative averments in criminal cases (1 Ph. Ev., 555, etc.; 3 Russ. on Cr., 276–9) belong rather to criminal procedure than to evidence. Again, in every branch of substantive law there are presumptions, more or less numerous and important, which can be understood only in connection with those branches of the law. Such are the presumptions as to the ownership of property, as to consideration for a bill of exchange, as to many of the incidents of the contract of insurance. Passing over all these, I have embodied in Chapter XIV those presumptions only which bear upon the proof of facts likely to be proved on a great variety of different occasions, and those estoppels only which arise out of matters of fact, as distinguished from those which arise upon deeds or judgments.

NOTE XXXVI.

(To ARTICLE 94.)

The presumption of innocence belongs principally to the criminal law, though it has, as the illustrations show, a bearing on the proof of ordinary facts. The question, "What doubts are reasonable in criminal cases?" belongs to the criminal law.

NOTE XXXVII.

(To ARTICLE 101.)

The first part of this article is meant to give the effect of the presumption, *omnia esse rite acta*, 1 Ph. Ev., 480, etc.; T. E., s. 124, etc.; Best, s. 353, etc. This, like all presumptions, is a very vague and fluid rule at best, and is applied to a great variety of different subject matters.

NOTE XXXVIII.

(To ARTICLES 102–105.)

These articles embody the principal cases of estoppels *in pais*, as distinguished from estoppels by deed and by record. As they may be applied in a great variety of ways and to infinitely various circumstances, the application of these rules has involved a good deal of detail. The rules them-

selves appear clearly enough on a careful examination of the cases. The latest and most extensive collection of cases is to be seen in 2 S. L. C., 851–880, where the cases referred to in the text and many others are abstracted. See, too, 1 Ph. Ev., 350–3; T. E., ss. 88–90, 776, 778; Best, s. 543.

Article 102 contains the rule in *Pickard v. Sears*, 6 A. and E., 474, as interpreted and limited by Parke, B., in *Freeman v. Cooke*, 6 Bing., 174, 179. The second paragraph of the article is founded on the application of this rule to the case of a negligent act causing fraud. The rule as expressed is collected from a comparison of the following cases: *Bank of Ireland v. Evans*, 5 H. L. C., 389; *Swan v. British and Australasian Company*, which was before three courts, see 7 C. B. (N. S.), 448; 7 H. and N., 603; 2 H. and C., 175, where the judgment of the majority of the court of exchequer was reversed; and *Halifax Guardians v. Wheelwright*, L. R., 10 Ex., 183, in which all the cases are referred to. All of these refer to *Young v. Grote* (4 Bing., 253), and its authority has always been upheld, though not always on the same ground. The rules on this subject are stated in general terms in *Carr v. L. & N. W. Railway*, L. R. 10 C. P., 316–17.

It would be difficult to find a better illustration of the gradual way in which the judges construct rules of evidence, as circumstances require it, than is afforded by a study of these cases.

NOTE XXXIX.

(To CHAPTER XV.)

The law as to the competency of witnesses was formerly the most, or nearly the most, important and extensive branch of the law of evidence. Indeed, rules as to the incompetency of witnesses, as to the proof of documents, and as to the proof of some particular issues, are nearly the only rules of evidence treated of in the older authorities. Great part of Bentham's "Rationale of Judicial Evidence" is directed to an exposure of the fundamentally erroneous nature of the theory upon which these rules were founded; and his attack upon them has met with a success so nearly complete that it has itself become obsolete. The history of the subject is to be found in Mr. Best's work, book i, part i, ch. ii, ss. 132–188. See, too, T. E., 1210–57, and R. N. P., 177–81. As to the old law, see 1 Ph. Ev., 1–104.

NOTE XL.

(To ARTICLE 107.)

The authorities for the first paragraph are given at great length in Best, ss. 146–165. See, too, T. E., s. 1240. As to paragraph 2, see Best, s. 148; 1 Ph. Ev., 7; 2 Ph. Ev., 457; T. E., s. 1241. The concluding words of the first paragraph are

framed with reference to the alteration in the law as to the competency of witnesses made by 32 and 33 Vict., c. 68, s. 4. The practice of insisting on a child's belief in punishment in a future state for lying as a condition of the admissibility of its evidence leads to anecdotes and to scenes little calculated to increase respect either for religion or for the administration of justice. The statute referred to would seem to render this unnecessary. If a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, *à fortiori*, a child who has received no instructions on the subject must be competent also.

NOTE XLI.

(To ARTICLE 108.)

At common law the parties and their husbands and wives were incompetent in all cases. This incompetency was removed as to the parties in civil, but not in criminal cases, by 14 and 15 Vict., c. 99, s. 2; and as to their husbands and wives, by 16 and 17 Vict., c. 83, ss. 1, 2. But sec. 2 expressly reserved the common law as to criminal cases and proceedings instituted in consequence of adultery.

The words relating to adultery were repealed by 32 and 33 Vict., c. 68, s. 3, which is the authority for the next article.

Persons interested, and persons who had been convicted of certain crimes, were also incompetent

witnesses, but their incompetency was removed by 6 and 7 Vict., c. 85.

NOTE XLII.

(TO ARTICLE 111.)

The cases on which these articles are founded are only Nisi Prius decisions; but as they are quoted by writers of eminence (1 Ph. Ev., 139; T. E., s. 859), I have referred to them.

In the trial of Lord Thanet, for an attempt to rescue Arthur O'Connor, Serjeant Shepherd, one of the special commissioners, before whom the riot took place in court at Maidstone, gave evidence: *R. v. Lord Thanet*, 27 S. T., 836.

I have myself been called as a witness on a trial for perjury to prove what was said before me when sitting as an arbitrator. The trial took place before Mr. Justice Hayes at York, in 1869.

As to the case of an advocate giving evidence in the course of a trial in which he is professionally engaged, see several cases cited and discussed in Best, ss. 184–6.

In addition to those cases, reference may be made to the trial of Horne Tooke for a libel in 1777, when he proposed to call the attorney-general (Lord Thurlow), 20 S. T., 740. These cases do not appear to show more than that, as a rule, it is for obvious reasons improper that those who conduct a case as advocates should be called as witnesses in it. Cases,

however, might occur in which it might be absolutely necessary to do so. For instance a solicitor engaged as an advocate might, not at all improbably, be the attesting witness to a deed or will.

NOTE XLIII.

(To ARTICLE 115.)

This article sums up the rule as to professional communications, every part of which is explained at great length, and to much the same effect, in 1 Ph. Ev., 105-122; T. E., ss. 832–9; Best, s. 581. It is so well established and so plain in itself that it requires only negative illustrations. It is stated at length by Lord Brougham in *Greenough v. Gaskell*, 1 M. and K., 98. The last leading case on the subject is *R. v. Cox and Railton*, L. R., Q. B. D., 153. Leges Henrici Primi, v. 17. "Caveat sacerdos ne de hiis qui ei confitentur peccata alicui recitet quod ei confessus est, non propinquis, non extraneis. Quod si fecerit deponetur et omnibus dietus vitæ suæ ignominiosus peregrinando pœniteat." 1 M., 508.

NOTE XLIV.

(To ARTICLE 117.)

The question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally has never been solemnly decided in England, though it is stated by the text writers that they can.

See 1 Ph. Ev., 109; T. E. ss. 837–8; R. N. P., 190; Starkie, 40. The question is discussed at some length in Best, ss. 583–4, and a pamphlet was written to maintain the existence of the privilege by Mr. Baddeley in 1865. Mr. Best shows clearly that none of the decided cases are directly in point, except *Butler v. Moore* (MacNally, 253–4), and possibly *R. v. Sparkes*, which was cited by Garrow in arguing *Du Barre v. Livette* before Lord Kenyon (1 Pea., 108). The report of his argument is in these words: "The prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted, and that confession was permitted to be given in evidence on the trial (before Buller, J.), "and he was convicted and executed." The report is of no value, resting as it does on Peake's note of Garrow's statement of a case in which he was probably not personally concerned, and it does not appear how the objection was taken, or whether the matter was ever argued. Lord Kenyon, however, is said to have observed: "I should have paused before I admitted the evidence there admitted."

Mr. Baddeley's argument is in a few words, that the privilege must have been recognized when the Roman Catholic religion was established by law, and that it has never been taken away.

I think that the modern law of evidence is not so old as the Reformation, but has grown up by the practice of the courts, and by decisions in the course of the last two centuries. It came into existence

at a time when exceptions in favor of auricular confessions to Roman Catholic priests were not likely to be made. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in legal advisers, but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them. This is the ground on which the Irish master of the rolls (Sir Michael Smith) decided the case of *Butler v. Moore*, in 1802 (MacNally Ev., 253–4). It was a demurrer to a rule to administer interrogatories to a Roman Catholic priest as to matter which he said he knew, if at all, professionally only. The judge said, "It was the undoubted legal constitutional right of every subject of the realm who has a cause depending, to call upon a fellow subject to testify what he may know of the matters in issue, and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted that no special exemption could be shown in the present instance, and analogous cases and principles alone were relied upon." The analogy, however, was not considered sufficiently strong.

Several judges have, for obvious reasons, expressed the strongest disinclination to compel such a disclosure. Thus Best, C. J., said, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence" (*obiter*, *Broad v. Pitt*, 3 C. and P., 518). Alder-

son, B., thought (rather it would seem as a matter of good feeling than as a matter of positive law) that such evidence should not be given: *R. v. Griffin*, 6 Cox Cr. Ca., 219.

NOTE XLV.

(To ARTICLES 126, 127, 128.)

These articles relate to matters almost too familiar to require authority, as no one can watch the proceedings of any court of justice without seeing the rules laid down in them continually enforced. The subject is discussed at length in 2 Ph. Ev., pt. 2, chap. x, p. 456, etc.; T. E., s. 1258, etc.; see, too, Best, s. 631, etc. In respect to leading questions, it is said, "It is entirely a question for the presiding judge whether or not the examination is being conducted fairly:" R. N. P., 182.

NOTE XLVI.

(To ARTICLE 129.)

This article states what is now the well-established practice of the courts, and it never was more strikingly illustrated than in the case referred to in the illustration. But the practice which it represents is modern, and it may perhaps be doubted whether upon solemn argument it would be held that a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transac-

tion of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted, and been attended to by him, would it be lawful, under pretense of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs, extending over many years, and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered. The following section of the Indian evidence act (1 of 1872) may perhaps be deserving of consideration. After authorizing, in sec. 147, questions as to the credit of the witness, the act proceeds as follows in sec. 148:

"If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if he thinks fit, warn the witness that he is not obliged to answer it. In exercising this discretion, the court shall have regard to the following considerations:

"(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion

of the court as to the credibility of the witness on the matter to which he testifies.

"(2) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies.

"(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence."

Order XXXVI., rule 38, expressly gives the judge a discretion which was much wanted, and which I believe he always possessed.

NOTE XLVII.

(To ARTICLE 131.)

The words of the two sections of 17 and 18 Vict., c. 125, meant to be represented by this article, are as follows:

22. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony;

but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement.

23. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

The sections are obviously ill-arranged; but apart from this, s. 22 is so worded as to suggest a doubt whether a party to an action has a right to contradict a witness called by himself whose testimony is adverse to his interests. The words "he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence," suggest that he cannot do so unless the judge is of that opinion. This is not, and never was the law. In *Greenough v. Eccles*, 5 C. B. (N. S.), p. 802, Williams, J., says: "The law was clear that you might not discredit your own witness by general evidence of bad character; but you might, nevertheless, contradict him by other evidence relevant

to the issue," and he adds (p. 803): "It is impossible to suppose that the Legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relative to the issue—a right not only established by authority, but founded on the plainest good sense."

Lord Chief Justice Cockburn said of the 22d section: "There has been a great blunder in the drawing of it, and on the part of those who adopted it." . . . "Perhaps the better course is to consider the second branch of the section as altogether superfluous and useless (p. 806)." On this authority I have omitted it.

For many years before the common law procedure act of 1854 it was held, in accordance with *Queen Caroline's Case* (2 Br. and Bing., 286–291), that a witness could not be cross-examined as to statements made in writing, unless the writing had been first proved. The effect of this rule in criminal cases was that a witness could not be cross-examined as to what he had said before the magistrates without putting in his deposition, and this gave the prosecuting counsel the reply. Upon this subject rules of practice were issued by the judges in 1837, when the prisoner's counsel act came into operation. The rules are published in 7 C. and P., 676. They would appear to have been superseded by the 28 Vict., c. 18.

NOTE XLVIII.

The statute law relating to the subject of evidence may be regarded either as voluminous or not, according to the view taken of the extent of the subject.

The number of statutes classified under the head "Evidence" in Chitty's statutes is 35. The number referred to under that head in the index to the Revised Statutes is 39. Many of these, however, relate only to the proof of particular documents, or matters of fact which may become material under special circumstances.

Of these I have noticed a few which, for various reasons, appeared important. Such are: 34 and 35 Vict., c. 112, s. 19 (see article 11); 9 Geo. IV., c. 14, s. 1, amended by 19 and 20 Vict., c. 97, s. 13 (see article 17); 9 Geo. IV., c. 14, s. 3; 3 and 4 Will. IV., c. 42 (see article 28); 11 and 12 Vict., c. 42, s. 17 (article 33); 30 and 31 Vict., c. 35, s. 6 (article 34); 7 James I., c. 12 (article 38); 7 and 8 Geo. IV., c. 28, s. 11, amended by 6 and 7 Will. IV., c. 111; 24 and 25 Vict., c. 96, s. 116; 24 and 25 Vict., c. 90, s. 37 (see article 56); 8 and 9 Vict., c. 10, s. 6; 35 and 36 Vict., c. 6, s. 4 (article 121); 7 and 8 Will. III., c. 3, ss. 2–4; 39 and 40 Geo. III., c. 93 (article 122).

Many, again, refer to pleading and practice rather than evidence, in the sense in which I employ the

word. Such are the acts which enable evidence to be taken on commission if a witness is abroad, or relate to the administration of interrogatories.

Those which relate directly to the subject of evidence, as defined in the introduction, are the ten following acts:

1.

46 Geo. III., c. 37 (1 section; see article 120). This act qualifies the rule that a witness is not bound to answer questions which criminate himself by declaring that he is not excused from answering questions which fix him with a civil liability.

2.

6 and 7 Vict., c. 85. This act abolishes incompetency from interest or crime (4 sections; see article 106).

3.

8 and 9 Vict., c. 113: "An act to facilitate the admission in evidence of certain official and other documents" (8th August, 1845; 7 sections).

S. 1, after preamble reciting that many documents are, by various acts, rendered admissible in proof of certain particulars if authenticated in a certain way, enacts *inter alia* that proof that they were so authenticated shall not be required if they purport to be so authenticated. (Article 79.)

S. 2. Judicial notice to be taken of signatures of certain judges. (Article 58, latter part of clause 8.)

S. 3. Certain acts of Parliament, proclamations, etc., may be proved by copies purporting to be Queen's printer's copies. (Article 81.)

S. 4. Penalty for forgery, etc. This is omitted as belonging to the criminal law.

Ss. 5, 6, 7. Local extent and commencement of act.

-4.

14 and 15 Vict., c. 99: "An act to amend the law of evidence," 7th August, 1851 (20 sections):

S. 1 repeals part of 6 and 7 Vict., c. 85, which restricted the operation of the act.

S. 2 makes parties admissible witnesses, except in certain cases. (Effect given in articles 106 and 108.)

S. 3. Persons accused of crime, and their husbands and wives, not to be competent. (Article 108.)

S. 4. The first three sections not to apply to proceedings instituted in consequence of adultery. Repealed by 32 and 33 Vict., c. 68. (Effect of repeal, and of s. 3 of the last named act given in article 109.)

S. 5. None of the sections above mentioned to affect the wills act of 1838, 7 Will. IV. and 1 Vict., c. 26. (Omitted as part of the law of wills.)

S. 6. The common law courts authorized to grant inspection of documents. (Omitted as part of the law of civil procedure.)

S. 7. Mode of proving proclamations, treaties, etc. (Article 84.)

S. 8. Proof of qualification of apothecaries. (Omitted as part of the law relating to medical men.)

Ss. 9, 10, 11. Documents admissible either in England or in Ireland, or in the colonies, without proof of seal, etc., admissible in all. (Article 80.)

S. 12. Proof of registers of British ships. (Omitted as part of the law relating to shipping.)

S. 13. Proof of previous convictions. (Omitted as belonging to criminal procedure.)

S. 14. Certain documents provable by examined copies, or copies purporting to be duly certified. (Article 79, last paragraph.)

S. 15. Certifying false documents a misdemeanor. (Omitted as belonging to criminal law.)

S. 16. Who may administer oaths. (Article 125.)

S. 17. Penalties for forging certain documents. (Omitted as belonging to the criminal law.)

S. 18. Act not to extend to Scotland. (Omitted.)

S. 19. Meaning of the word "Colony." (Article 80, note 1.)

S. 20. Commencement of act.

5.

17 and 18 Vict., c. 125. The common law procedure act of 1854 contained several sections which altered the law of evidence.

S. 22. How far a party may discredit his own witness. (Articles 131, 133; and see note xlvii.)

S. 23. Proof of contradictory statements by a witness under cross-examination. (Article 131.)

S. 24. Cross-examination as to previous statements in writing. (Article 132.)

S. 25. Proof of a previous conviction of a wit ness may be given. (Article 130 (1).)

S. 26. Attesting witnesses need not be called unless writing requires attestation by law. (Article 72.)

S. 27. Comparison of disputed handwritings. (Articles 49 and 52.)

After several acts, giving relief to Quakers, Moravians and Separatists, who objected to take an oath, a general measure was passed for the same purpose in 1861.

6.

24 and 25 Vict., c. 66 (1st August, 1861, 3 sections):

S. 1. Persons refusing to be sworn from conscientious motives may make a declaration in a given form. (Article 123.)

S. 2. Falsehood upon such a declaration punishable as perjury. (Do.)

S. 3. Commencement of act.

7.

28 Vict., c. 18 (9th May, 1865, 10 sections):

S. 1. Sections 3–8 to apply to all courts and causes, criminal as well as civil.

S. 3. Re-enacts 17 and 18 Vic., c. 125, s. 22,
S. 4. " " " s. 23.
S. 5. " " " s. 24.
S. 6. " " " s. 25.
S. 7. " " " s. 26.
S. 8. " " " s. 27.

The effect of these sections is given in the articles above referred to by not confining them to proceedings under the Common Law Procedure Act, 1854.

The rest of the act refers to other subjects.

8.

31 and 32 Vict., c. 37 (25th June, 1868, 6 sections):

S. 1. Short title.

S. 2. Certain documents may be proved in particular ways. (Art. 83, and for schedule referred to see note to the article.)

S. 3. The act to be in force in the colonies. (Article 83.)

S. 4. Punishment of forgery. (Omitted as forming part of the Criminal Law.)

S. 5. Interpretation clauses embodied (where necessary) in Article 83.

S. 6. Act to be cumulative on Common Law. (Implied in article 73.)

9.

32 and 33 Vict., c. 68 (9th August, 1869, 6 sections):

S. 1. Repeals part of 14 and 15 Vict., c. 99, s. 4, and part of 16 and 17 Vict., c. 83, s. 2. (The effect of this repeal is given in article 109; and see note xli.)

S. 2. Parties competent in actions for breach of promise of marriage, but must be corroborated. (See articles 106 and 121.)

S. 3. Husbands and wives competent in proceedings in consequence of adultery, but not to be compelled to answer certain questions. (Article 109.)

S. 4. Atheists rendered competent witnesses. (Articles 106 and 123.)

S. 5. Short title.

S. 6. Act does not extend to Scotland.

10.

33 and 34 Vict., c. 49 (9th August, 1870, 3 sections):

S. 1. Recites doubts as to meaning of "court" and "judge" in s. 4 of 32 and 33 Vict., c. 68, and defines the meaning of those words. (The effect of this provision is given in the definitions of "court" and "judge" in article 1, and in s. 125.)

S. 2. Short title.

S. 3. Act does not extend to Scotland.

These are the only acts which deal with the law of evidence as I have defined it. It will be observed that they relate to three subjects only—the competency of witnesses, the proof of certain

classes of documents, and certain details in the practice of examining witnesses. These details are provided for twice over, namely, once in 17 and 18 Vict., c. 125, ss. 22–27, both inclusive, which concern civil proceedings only; and again in 28 Vict., c. 18, ss. 3–8, which re-enact these provisions in relation to proceedings of every kind.

Thus, when the statute law upon the subject of evidence is sifted and put in its proper place as part of the general system, it appears to occupy a very subordinate position in it. The ten statutes above mentioned are the only ones which really form part of the law of evidence, and their effect is fully given in twenty* articles of the Digest, some of which contain other matter besides.

* 1, 49, 52, 58, 72, 79, 80, 81, 83, 84, 106, 108, 109, 120, 121, 123, 125, 131, 132, 133.

ADDITIONAL NOTES

BY AMERICAN EDITOR.

NOTE XLIX.

(ON ARTICLE 90.)

My attention has been called to an apparent exception to clause (3) of article 90, p. 128, permitting proof of the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, as established by certain cases which hold that a deed cannot, like an unsealed instrument, be delivered conditionally to the person to whom it is executed, but that every delivery of a deed to the grantee must of necessity be absolute although intended to be in escrow. These cases are collected in Browne on Parol Evidence (§ 89, p. 279), the only work on Evidence in which I have found them referred to at all, probably because the writers of other text books regard the question upon which they turn as one belonging rather to the law of contracts, than to the law of evidence. The distinction resting wholly upon the technical difference between a simple contract and one under seal does not commend itself as founded in any principle of justice, and Mr. Jones in his work on Construction of

Contracts, § 163, says it "cannot be successfully defended," and that "the best authorities do not sustain the proposition that a deed cannot be put into the possession of a grantee upon condition, and such a rule could not be enforced unless the courts were prepared to yield the principle that the real intention of the parties must govern the interpretation of their acts." The most elaborate opinion upon this subject will be found in the case of *Miller v. Fletcher*, 27 Gratt., 403; 21 Am. R., 356; but its effect is almost entirely done away with by the subsequent decision of the same court in the case of *Wendlinger v. Smith*, 75 Va. St., 309. The only recent cases in which I find the rule recognized are *Baum v. Parkhurst*, 26 Ills. App., 128, and *Murray v. W. W. Kimball Co.*, 10 Ind. App., 184, where the novel proposition is maintained that "a simple contract may be delivered as an escrow but not directly to the promisee to be so held by him. Nearly a year after the decision in *Baum v. Parkhurst* the Supreme Court of the United States in deciding the case of *Ware v. Allen*, 128 U. S., 590, declared the latter to be "one of that class of cases well recognized in the law in which an instrument whether delivered to a third person as an escrow, or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter." The instrument before the court in this case was a promissory note, but the language used by Mr. Justice Miller in delivering the opinion was broad

enough to include all contracts, and was, as will be noted, even more appropriate to specialties than to unsealed instruments, and several of the cases relied upon as authority for this opinion are those of deeds delivered conditionally to the grantees.

All the standard works on Evidence, both English and American, so far as I have been able to discover, lay down the rule in the same terms as Mr. Justice Stephen in the text.

NOTE L.

(ON ARTICLE 110 A.)

Concerning these rulings, Mr. Justice Miller in the case of *Sweeny v. Easter*, 1 Wall., 173, says: "Perhaps no subject connected with commercial paper has been more the subject of controversy and of opposing and well balanced judicial decisions than the proposition here relied on. It was first laid down in the English courts in the case of *Walton v. Shelley* (1 Term R., 296), and afterwards held the other way in *Jordaine v. Lashbrooke* (7 Id., 601). This court has steadily adhered to the doctrine of *Walton v. Shelley*, and we are referred by counsel for plaintiffs in error to our own decisions on this subject in 6 Peters, 51; 8 Peters, 12; 3 Howard, 73, and 13 Howard, 229."

The courts of the following states adopt the rule of *Walton v. Shelley* given in article 110 A, viz.: Maine, Massachusetts, Pennsylvania, Mississippi, Louisiana, Ohio, Illinois, Iowa and Tennessee; but

it is rejected in the courts of New Hampshire, Vermont, Connecticut, New York, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Michigan, Kentucky and Missouri. The best collection of the cases on this subject will be found in 12 American Reports, p. 93, in a note to the case of *Dewey v. Warriner*, 71 Ill., 198. Many of the cases are also given in the note to § 385 in 1 Greenleaf on Evidence.

INDEX.

THE REFERENCES ARE TO THE PAGES.

Acceptance of bill of exchange, estoppel of, 156.
Accomplice, evidence of, 173.
Acts of Congress, judicially noticed, 94; how proved, 118.
of conspirators, rule of evidence as to, 10.
of Legislature, judicially noticed, 94; how proved, 118.
showing intention, good faith, etc., 21.
"Admission," definition of, 30.
by one joint contractor not binding on remainder to bar Statute of Limitations, 34.
by partners and joint contractors, 33; *illustration of*, 36.
by persons having a common interest, 34; *illustration of*, 36.
by persons referred to by party, 37; *illustration of*, 38.
cannot be made in criminal cases, 99.
made under duress, 38.
made without prejudice, 38.
principal not agent of surety to make, 35; *illustration of, ib.*
statement by agent when not, 33; *illustration of, ib.*
statement made by person interested in action, or privy, when, 32; *illustration of, ib.*
statement of person sued in a representative character when, 32.
Admissions by agents, 33; *illustrations of*, 36.
by counsel or attorney, 34.

Admissions by strangers to action when relevant, 37.
by whom, may be made, 31; *illustrations of*, 32.
statements by counsel or attorney, when not, 34.
Affairs of State, rule as to witness disclosing, 163.
Affirmation in place of oath, 175.
Affirms, he who, must prove, 140.
Age, what statements are deemed relevant and irrelevant in a question as to a person's, 50.
Agency, proof of, 27.
Agent, estoppel of, 156.
Agents, admission by, 33.
Agreement, parol variation of written, 128, 129.
Alteration of documents, presumption as to, 125, 126.
Arrest, what is deemed to be relevant as proving the, of a person in a particular place, 50.
Arson, what are deemed relevant facts in the case of a man accused of, 25,
Art or Science, what the words include, 83.
Assignee of a bankrupt, statement by, 32.
Attested documents, 104, etc.
Attesting witness denying the execution of document, 107.
when need not be called, 105.
Attorneys, confidential communication with, privileged, 165–168.
Attorneys and solicitors, when not compellable to produce documents, 170.

Bailee, estoppel of, 156.
Bill of exchange, effect of indorsement or memorandum made on a, 52.
estoppel of acceptor of a, 156.
Birth, 30; declaration as to the place of, 217.
Blanks in wills, 136.
Bodily feeling, acts showing, relevant, 21.
statements showing, relevant, 21.
Bond, in action on a, no notice to produce required, 113.
Books of account, when admissible in evidence, 67, 68.
corporation, when admissible in evidence, 66, 67.
Burden of proof, 140.

Burden of proof, he who affirms must prove, 140.
presumption of innocence, 140.
on whom the general lies, 142; *illustrations of this*, 142, 143.
as to particular fact, 144.
as to fact to be proved to make evidence admissible, 145.
when parties stand in a fiduciary relation, 146.
Business, declaration made in the ordinary course of, 49.

Capture, loss of a ship by, 70.
Cases in which an attesting witness need not be called, 105.
in which secondary evidence as to documents may be given, 108–111.
Certified copies of documents admissible, 117, 118, 119, 120, 121.
Character as affecting damages in civil cases generally irrelevant, 91.
evidence of general reputation and not of particular acts may be given, 91.
generally irrelevant in civil cases, 90.
good, when evidence given of, previous bad character may be proved, 91.
in criminal proceedings when relevant, 90.
Charts, statements in, 66.
Child, evidence of, 238.
Clergymen compelled to disclose confidential communications, 169, 240.
Commission of offense, information as to how far privileged, 164.
Comparison of handwriting, when permitted, 87.
Competency of witnesses, 158, 169.
in criminal cases, 161.
of husband and wife as witnesses, 161, 162.
of jurors as witnesses, 164, 165.
of judges as witnesses, 163.
Communications during marriage privileged, 162.
Complaint of person against whom crime committed, fact of, relevant, but terms not, 16; *illustration of*, 17.

"Conclusive proof," definition of, 4.
Conduct, estoppel by, 152, 153.
of person against whom crime committed, relevancy of facts showing, 16; *illustration of*, 17.
"Confession," definition of, 39.
facts discovered in consequence of, though improperly obtained, relevant, 42; *illustration of*, 43.
made by accused persons without warning, 45.
made in consequence of deception, relevancy of, 45.
made under promise of secrecy, relevancy of, 45.
made when drunk, relevancy of, 45.
to persons in authority, 40.
when impression produced by threat, inducement or promise is removed, 42; *illustration of*, 43.
when made as a religious duty, 41; *illustration of*, 43.
when made by inducement collateral to the proceeding, 41; *illustration of*, 43.
when made to a person not in authority, 41; *illustration of*, 43.
when not deemed voluntary, 40; *illustration of*, 42.
when relevant, 39.
Confessions made on oath, when relevant, 44; *illustration of, ib.*
made on oath, when witness improperly compelled to answer, 44.
Confidential or professional communication, 165, etc.
husband and wife during marriage, 162.
as to affairs of state, 163.
to public officers as to commission of offenses, 164.
jurors, 164.
legal advisers, 165–168.
clergymen, 169.
medical men, 169.

Confirmation of oral testimony by inspection, view or photographs, 101*a*, etc.
Confidential or professional communication, clergymen, 169.
medical men, 169.
See also Notes XLIII and XLIV, p. 240.
Conspirators, acts of, 10.
judge must be satisfied of primâ facie case against, 11.
relevancy of facts as against, 10; *illustration of*, 11.
Contracts, grants, etc., in writing, evidence as to terms of, 127–132.
Conversation by telephone, 101.
Conveyancers licensed, communication to how far privileged, *quære*, 167.
Copies of documents, when equivalent to exemplifications, 116.
Corroboration of mother of bastard child required, 172.
of plaintiff required in proceedings for divorce, 173.
required when evidence given by accomplice, 173.
Course of business, relevancy of, 27, *illustrations of*, *ib.*
Court, of what facts takes judicial notice, 93–98.
Credit of witness, impeaching, 186.
Crimes, illustration of facts tending to connect criminals with, 14–17.
Criminal cases, complaints of persons injured are deemed relevant, 16, 17.
confessions in, when relevant, 39–45.
competency of witnesses in, 161.
evidence of character in, 90.
Criminate himself, witness may not be compelled to, 171, 172.
Cross-examination of witnesses, 178–187.
to what must be directed, 179.
questions lawful in, 180; *illustrations of*, 182.
as to inconsistent statements, 183.
as to statements in writing, 185.
Custom, relevancy of facts as to, 13; *illustrations of*, *ib.*

Damages, character as affecting, 91.
what is conclusive proof in an action for, 70.

Date of document, may be proved by parol, 228.
presumption as to, 122.
Death, presumption of, 149.
dying declaration as to cause of, 47, 217.
presumption of from seven years' absence, 149.
Deceased person, statements by, when deemed relevant, 46.
Declaration, as to place of birth, ref. to case illustrative of, 217.
against interest, 50.
against interest, indorsement of payment on bond or note by deceased person, 52.
against interest not relevant unless interest pecuniary or proprietary, 52; *illustration of*, 53.
against interest pecuniary or proprietary, relevancy of, 50.
against interest, when not relevant, 51; *illustrations of*, 53, 54.
against interest, when relevant, 50; *illustrations of*, 53, 54.
as to general right, relevant when made by persons having means of knowledge, 56.
as to public right, relevant by whomever made, 56.
by testator as to contents of will relevant, 55.
dying, as to cause of death, when relevant, 47; *illustrations of*, 48.
dying, not irrelevant because intended to be made as deposition, 47; *illustration of*, 48.
irrelevant except made in ordinary course of business or duty, 49; *illustrations of, ib.*
made in course of business, relevancy of, 49; *illustrations of, ib.*
made in discharge of professional duty, relevancy of, 49; *illustrations of*, 50.
Declarations as to facts from which public rights may be inferred, not relevant, 56; *illustration of*, 57.
as to pedigree when relevant, 57.
by whom to be made, 59.
conditions under which they are to be made, 58, 59; *illustrations of, ib.*

Declarations as to public or general rights relevant, 56; *illustrations of, ib.*
relevant under articles 25–32, what may be proved in reference to, 135.
Deed forged, a legal adviser who witnesses a, must give evidence of what took place at the time, 168.
Deeds, presumption as to sealing and delivery of, 127.
can they be delivered in escrow to the grantees (*quære*), Note XLIX, 256.
Definition of terms, 3, 4.
Divorce, what is deemed conclusive proof of, 71.
"Document," definition of, 3.
date of, presumption as to, 122; *illustrations of, ib.*
person other than party to, may prove fact not varying or altering right or liability, 92; *illustrations of, ib.*
public, may be proved by examined copy, 75.
presumption, as to date of, 122.
presumption, as to sealing and delivery of, 123.
presumption, as to thirty years old, 124.
stamp of, presumption as to, 123.
used to refresh memory, 189.
using, as evidence when production refused on notice, 191.
when called for and produced and inspected must be given in evidence if party producing requires it, 190.
"Documentary evidence," definition of, 4.
of contracts, 127.
cannot be varied by oral evidence, 127.
exceptions, 128–130; *illustrations of*, 130, etc.
Documents admissible throughout the Union, 115, 118–121.
certified copies of admissible, 115, 117–121.
construction of, what evidence may be given, 132–135; *illustrations of*, 135–138.
contents of, when irrelevant, 29.
how proved by primary evidence, 102.
notice to produce, rules as to, 111, 112, 113.

Documents, persons entitled to refuse production of, not compelled to give evidence of contents, 170.
presumption as to alteration of, 125, 126.
production of, when witness entitled to refuse, 169.
proof of attested, acknowledged under statute, 107.
proof of execution of, when attested, 104, 105, 106.
proof of, must be by primary evidence, 103.
exceptions, 108–111.
proof of, when attesting witness denies execution, 107.
proof of, when attesting witness need not be called, 105, 106.
public, proof of, 114.
public, proved by production from proper custody, 114.
thirty years old, presumption as to, 124.
when secondary evidence of contents may be given, 108–111.
Dying declaration as to cause of death, how regarded, 47; see, also, 213, as proving or what must be proved, 145.

Endorsement of payment made upon a promissory note, bill of exchange, or other writing, effect of an, 52.
Entries in books of corporations, when relevant, 66.
in party's own books, when relevant, 67–69.
Entry in public record made in performance of duty relevant, 64.
Estoppel by conduct, 152; *illustrations of*, 153–155.
effect of judgment not pleaded as an, 75.
of acceptor of bill of exchange, 156.
of bailee, agent, and licensee, 156.
of tenant or licensee, 155.
"Evidence," definition of, 3.
as to affairs of state, 163.
false, on affirmation punishable as perjury, 175.
improper admission of, 192.
improper rejection of, 192.
in former proceedings when relevant, 60, 61.
conditions under which it may be given, 61, 62.
need not be given of admitted facts, 99.

"Evidence," oral, how taken, 176.
oral, may be taken by deposition, 176.
oral, may be taken in open court, 176.
oral, may be taken under a commission, 176.
oral, must be direct, 100.
oral, not excluded by a documentary memorandum of fact, 129.
oral, reduced to writing, when may be objected to, 177.
proof of facts by oral, 100.
to be on oath, or affirmation, 175.
"Evidence, secondary," definition of, 108.
of documents, when may be given, 108–111.
Examination of witnesses, 178, etc.
Examined copy of public document, what is, 115.
Exchange, bill of, to fictitious payee, 23.
effect of an endorsement or memorandum of payment made on a, 52.
estoppel of acceptor of, 156.
Exemplifications, what are, 116.
Experts, facts bearing on opinions of, 85; *illustrations of*, 86.
opinions of, on points of science and art, 83, 84.
may give grounds of their opinion, 89.

"Fact," definition of, 3.
that particular person held particular office when relevant, 27.
Facts admitted need not be proved, 99.
"Facts in issue," definition of, 4.
Facts in issue and relevant to issue may be proved, 6; *illustration of*, *ib.*
necessary to introduce or explain relevant facts, relevancy of, 17; *illustrations of*, 18.
necessary to support or rebut an inference suggested by fact in issue, relevancy of, 17; *illustrations of*, 18.
of which Court takes judicial notice, 93–98.
of which Court takes judicial notice need not be proved, 98.
proof of by oral evidence, 100.

Facts relevant to facts in issue may be proved, 6; *illustration of, ib.*
relevant in cases of obtaining money by false pretenses, 22, 139.
showing existence of course of business, relevancy of, 27.
showing system, relevancy of, 25; *illustrations of, ib.*
similar to but unconnected with the facts in issue when relevant, 20; *illustrations of, ib.*
supporting or contradicting opinions of experts relevant, 150; *illustrations of, ib.*
too remote may be excluded by judge, 6.
which establish identity of any thing or person, relevancy of, 17; *illustration of*, 18.
which fix time and place at which any fact in issue or relevant happened, relevancy of, 17; *illustration of*, 18.
which show genuineness of document produced, relevancy of, 17; *illustrations of*, 18.
which show opportunity, relevancy of, 17; *illustration of*, 18.
which show relation of parties, relevancy of, 17; *illustration of*, 18.
which show relevancy of other facts, relevancy of, 17.
False pretenses, obtaining money by, facts relevant in cases of, 22, 139.
Fiduciary relation, on whom burden of proof lies when parties stand in a, 146.
Foreign Acts of State, how proved, 121.
judgments, same rules apply to such, as can be enforced by law in this country, 80.
how proved, 121.

General right common to considerable number of persons, 56.
Good faith, acts showing, relevant, 21; *illustrations of*, 22.
statements showing, relevant, 21.
Grant, presumption of lost, 150.
Grants, evidence of term of, reduced to writing, 127.

Handwriting, comparison of disputed, with genuine, 87, 88.
opinion as to, 86.

Handwriting, when person deemed acquainted with, 86; *illustrations of*, 87.
Hearsay irrelevant, except in certain cases, 29.
when relevant, 30.
admission, 30.
confession, 39.
dying declaration as to cause of death, 47.
declaration in course of business, 49.
against interest, 50.
as to wills, 54.
as to public rights, 55.
as to pedigree, 57.
general remarks on, 205–208.
History, relevancy of statements in works of, 65.
Husbands and wives, confidential communications between, 162.
when competent witnesses, 161, 162.

Illegitimacy, reference to a deceased reputed father's declaration as to his daughters, 59, note.
Impeaching credit of witness, 186.
Incompetent, what witnesses are, 158, etc.
Indecent evidence, remarks as to the exclusion of, 199.
Information as to the commission of offenses, 164.
Innocence, presumption of, 140.
Inspection by court or jury, 101*a*, etc.
Intention, acts showing, relevant, 21; *illustrations of*, 22.
statements showing, relevant, 21.
Interest, declaration against, 50–54.
Interpretation of documents, what evidence may be given for the, 132–138.
Irrelevant, 202; (see Relevancy.)
Journals of Legislatures, transactions on, not judicially noticed, 95.
"Judge," definition of, 3.
may exclude facts too remote, 6.
Judges, their competency and privileges, 163.
"Judgment," definition of, 69.

"Judgment," conclusive when party had no opportunity of pleading it as an estoppel, 75; *illustrations of*, 76.
foreign, how proved, 121.
not pleaded as estoppel relevant, 75; *illustration of, ib.*
offered as evidence may be proved to be procured by fraud, 79.
of State Courts, how proved in other states and in U. S. Courts, 119.
Judgment offered as evidence may be proved to have been reversed, 79.
offered as evidence may be proved that Court had no jurisdiction, 79.
Judgments conclusive in favor of judge, 78; *illustration of*, 79.
conclusive proof, 69; *illustrations of*, 70.
statements in, when irrelevant, 73; *illustration of*, 74; conclusive Admiralty and other cases *in rem*, 73; *illustrations of*, 74.
when conclusive between parties and privies, 71; *illustrations of, ib.*
when irrelevant between strangers, 76; *illustration of*, 77.
between parties and privies where issue different, 76; *illustration of*, 77.
in favor of strangers against parties and privies, 76; *illustration of*, 77.
except as being an admission, or if it relates to a matter of public or general interest, 77; *illustration of*, 78.
Judicial notice, facts need not be proved of which Court takes, 98.
facts of which Court takes, 93–98.
Judicial proceedings of State Courts, etc., how proved, 119.
Jurors, when competent to give evidence, 164, 165.

Knowledge, acts showing, relevant, 21; *illustration of*, 23, 24.
statements showing, relevant, 21.

Laws of United States, etc., Little & Brown's edition, evidence, 118.
Leading questions, 180.
Lease, when a verbal agreement in connection with a, may be proved, 131.
when oral evidence to prove a covenant in a, is admissible, 135.
Legal advisers, confidential communications with, 165–168.
Legatee and heir, statements admissible in questions between, 55, note.
Leges Henrici Primi, 240.
Legislative acts of States and Territories, how proved, 118.
Legitimacy, when presumed, 147.
Libel and slander, evidence of character in actions for, 91.
Licensee, estoppel of, 156.
Lost grant, presumption of, 150.

Malice, acts showing, relevant, 21; *illustration of*, 23.
Maps, relevancy of statements in, 66.
instance of, *ib.*
Marriage, communications during, 162.
opinion as to existence of, 88, 89.
opinion as to validity of, 88, 89.
Medical men compelled to disclose confidential communications, 169.
Memorandum of payment made upon a note, bill or other writing, effect of, 52.
Memory, as to witnesses refreshing their, 187.
right of adverse party to see writing used for refreshing memory, 190.
Motive, relevancy of facts supplying, 14; *illustrations of*, *ib.*

Notice to produce, rules as to, 111–113.
Number of witnesses necessary in certain case, 174.
Negotiable instruments, parties to cannot impeach, 162*b*, 256*b*.

Oaths, form of, 175.
when binding, 176.
Offense, rule as to witnesses giving information as to commission of, 164.
Offenses against women, what evidence is relevant, 187.

Opinion as to existence of marriage relevant, 88; not to prove bigamy or proceedings for divorce, 89.
as to sanity of testator when relevant, 82.
of witnesses, derived from personal observation, relevant when no better evidence can be obtained, 81; *illustrations of, ib.*, etc.
when relevant, grounds of, relevant, 89; *illustration of, ib.*
Opinions as to handwriting relevant when made by person acquainted with writing of supposed writer, 86.
duty of judge to decide whether person offering is an expert, 84.
generally irrelevant, 81; *illustrations of*, 82.
of experts as to existence of facts on which opinion founded irrelevant, 84; *illustration of*, 85.
of experts as to foreign laws relevant, 83.
of experts in matters of science or art relevant, 82; *illustrations of*, 84, etc.
Oral evidence, how it may be taken, 176. (See Witness.)
must be direct, 100.
exclusion of by documents, 127.
modification and interpretation of documents by, 132–139.
cases in which admissible, 135–139.
cases in which not admissible, 135–137.
to be upon oath except in certain cases, 175.
Party to negotiable cannot impeach it, 162*b*, 256*b*.
Paternity and legitimacy of children, presumption as to, 147.
Pedigree, declarations as to when relevant, 57, 59; *illustration of*, 60.
how statements as to may be made, 60.
Perjury, number of witnesses, 174.
on affirmation, 175.
Photographs, 101*d*, 103.
Plans, relevancy of statement in, 66.
Preparation, relevancy of facts constituting, 14; *illustrations of, ib.*
"Presumption," definition of, 4.
as to alteration of document, 125, 126.
as to date of document, 122; *illustrations of, ib.*

"Presumption," as to documents thirty years old, 124.
as to sealing and delivery of deeds, 123.
as to stamp of document, 123.
of death from seven years' absence, 149.
of execution of deeds to complete title, 152.
of innocence, 140; *illustrations of*, 141.
of legitimacy, 147.
of lost grant, 150; *illustrations of*, *ib.*
of regularity of judicial or official acts, 152.
Previous conviction, proof of, when relevant, 160, 187.
proved only by record or admission of party, 181, 183.
Priests, Roman Catholic, rule as to disclosing confidential communication made to, 169, 240.
Primary evidence of documents, what, 103.
Proclamations judicially noticed by Courts, 95.
recitals in, when relevant, 63.
Production of persons or things for inspection, 101*a*.
Professional communications, when privileged, 165–167; *illustrations of*, 167, 168.
Professional duty, when declarations made in course of, are relevant, 49.
Promissory note, effect of an endorsement of memorandum of payment made on, 52.
party to cannot impeach, 162*b*, 256*b*.
Proof, burden of, as to particular fact, 144; *illustrations of*, *ib.*
burden of, lies on him who affirms, 140, 142.
burden of, of fact to be proved to make evidence admissible, 145; *illustrations of*, *ib.*
burden of, on whom it lies, 142; *illustrations of*, *ib.*
burden of, when parties stand in fiduciary relations, 146.
of execution of attested documents, 104, 105.
of facts judicially noticed, 98.
when the attesting witness denies the execution, 107.
nature of as to evidence, 100.
Public documents, how proved, 114–121.
Records of State, etc., not judicial, how proved, 120.
right common to all citizens of the State, 56.
Public and general rights, when declarations as to, are deemed relevant, 56.
instance of manner in which these may be made, 57.

Public record, relevancy of entry in a, made in performance of duty, 64.

Recitals of public facts in statutes and proclamations, when relevant, 63.
Record, relevancy of a public, made in performance of duty, 64.
right of adverse party to see writing used for, 190.
Records and judicial proceedings of state courts, how proved, 119.
Records, general, of nation may be proved by certified copy, 115.
Refreshing memory by document, when admissible, 189.
Regularity, presumption of, 152.
Relevancy, definition of, 1.
Relevancy of facts forming part of the same transaction as facts in issue, 7; *illustrations of*, 8.
Relevant, definition of, 5.
what facts are deemed in evidence, 6–19.
Relevant evidence, when instances of, held to be insufficient on the ground of remoteness, may be found, 198.
Res gestæ, explanation of the phrase, 201.
Res inta alios acta alteri nocere non debet, remarks on application of the maxim to the law of evidence, 202, etc.
Rights, when declarations as to public and general, are deemed relevant, 55.
instance of how these declarations may be made, 57.
River, reference to case as to whether owner of one side of a river owned entire bed or only one-half, 10.
fact establishing right of fishing in, 12.
reference to decision affirming right to several fishing in a, 12.
Road in question, whether a public or private, what is deemed relevant, 56.
Rules, as to notice to produce documents, 111–113.

Science, opinion of experts on points of law regarding, 83.
"Science or Art," what the words include, 83.
Sealing and delivery of deeds, presumption as to, 123.
Secondary documentary evidence, 108, 111.

Secrecy, confession made under promise of, 45.
Seven years' absence, presumption of death from, 149.
Special pleaders, 167.
Stamp of a document, presumption as to, 123.
State, rule as to witnesses disclosing affairs of, 163.
State of body, acts showing, relevant, 21.
statements showing, relevant, 21.
State of mind, acts showing, relevant, 21.
statements showing, relevant, 21.
Statement of act of state or fact of public nature, when relevant, 63.
made in good faith, what is a relevant fact in the case of a, 21.
relevancy of, accompanying or explaining act, 15; *illustrations of*, 16.
Statements by deceased, insane or absent persons, relevancy of, 46.
causing state of mind, relevancy of, 16, 21.
inconsistent with testimony may be proved if desired by witness, 184.
in works of history, maps, charts and plans relevant when they relate to matters of general public interest, 65; irrelevant when they relate to private matters, *ib.*
made against interest, effects of, 50–54.
made in presence of person whose conduct is in issue are relevant, 16.
presenting state of mind, relevancy of, 21.
Statute of Limitations, indorsement or memorandum on promissory note of a payment does not exclude, 52.
declaration by deceased person to whom payment is made will exclude operation of, 52.
Statutes, foreign, how proved, 121.
of sister state, how proved, 118.
recitals of public facts in, when relevant, 63.
relating to evidence, enumeration and analysis of some of the more important English, 248, etc.
U. S., relating to competency of witnesses, 159.

Strangers, admissions by, when relevant, 37.
as against, judgments generally deemed irrelevant, 76.
Subsequent conduct of person accused, relevancy of facts showing, 14; *illustrations of*, 15.
Technical term, oral evidence admissible to explain, 132.
Telegraph and telephone communications, 101, 103*a*.
Tenant, estoppel of, 155.
Terms, definition of, 3, 4, 5.
Testator, evidence of declaration of intention by a, when relevant, 137, 229.
Testators, declaration by, as to contents of will, when relevant, 55.
Testify, who may, 158.
Theft, by married woman, committed in presence of her husband, burden of proof as to, 142.
what be proved in case of, 143.
Title, relevancy of facts as to, 12; *illustrations of*, *ib.*
Treason, 174.
number of witnesses, 174.

Verbal agreement, on which written one made contingent may be proved, 128.
Voluntary and involuntary confessions defined, 40–43.

Wife and husband, how regarded as witnesses, 161.
Will, declaration of testator as to contents of, when deemed relevant, 55.
Wills, omissions and mistakes in, to what extent may be amended by extrinsic testimony, 136–138.
Witness, attesting, when need not be called, 105–107.
proof when he denies the execution, 107.
cannot be contradicted as to answers to questions testing credit generally, 182.
competency of, 158.
who may testify, 158.
what are incompetent, 158–160.
in criminal cases, 161.
husband and wife, 161, 162.
clergymen and medical men, 169.

Witness, competency of judges, 163
jurors, 164.
cross-examination of, 179–185.
cross-examination of, as to previous statements in writing, 182.
deaf and dumb, not incompetent, but may give evidence by writing or signs in court, 158.
dying or becoming incapable, evidence given by, when good, 178.
evidence must be upon oath or affirmation, 175.
examination of, 178.
examination of, must be directed to relevant facts, 179.
found to be incompetent, evidence may be withdrawn, 178.
husband or wife when competent, 161, 162.
husband or wife when incompetent, 161, 162.
may be contradicted to show statements inconsistent with present testimony, 184; to show that he is not impartial, 183.
may be cross-examined as to credit, 181.
may be cross-examined as to veracity, 181.
may not be asked leading questions in examination in chief or re-examination, 180.
may not be contradicted as to collateral matters brought out on cross-examination, 182.
not bound to criminate himself, 171.
not party to suit when not compelled to produce document, 169.
not party to suit when not entitled to refuse to produce document, 169.
privilege of—
legal advisers as to confidential communications, 165.
as to cases in which government concerned, 164.
attorney as to production of documents, 170.
clergymen and medical men, 169.
re-examination of, must be confined to facts referred to in cross-examination, 179.

Witness, refreshing memory, 189.
when, incompetent from youth or incapacity, 158.
when, incompetent from infamy, 160.
unbelief in a God, 160.
when, may be cross-examined by party calling him, 180, 185.
when, not entitled to refuse to produce document, 169.
when, party to suit competent, 159.
Witnesses, number of, in treason against United States, 174.
number of, in treason against a state, 174.
number of, in perjury, 174.
Women, offenses against, 187.
Written agreements with a verbal condition, what may be proved in, 128.